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January - June 1962

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OPINION NO. 62-1

January 23, 1962

SUBJECT: CONDOMINIUM SUBDIVISION

Dear Sir:

Your request for an opinion is as follows:

REQUEST

"A set of plans delineating vertical separation of a multi-story apartment structure known as 'The Hamilton', located at 631 O'Farrell Street in 50 Vara Block 283, has been submitted by Mr. William J. Wright, Licensed Land Surveyor, to the City Engineer for checking and approval as a 'Tentative Subdivision Map'.

"In the accompanying letter of transmittal, dated January 3, 1962, a copy of which is attached, Mr. Wright states that the structure is being subdivided for condominium purposes.

"Your opinion is requested in answer to the following questions:

"1. Does the vertical separation of this structure for condominium purposes constitute a 'Subdivision' as defined in the Subdivision Map Act, particularly Article 3, Section 11,535, which Act is part of the Business and Professions Code of the State of California?

"2. Would the separation of any structure, vertically or laterally, for condominium purposes, regardless of whether or not the land upon which it stands is similarly divided, constitute a subdivision under the aforementioned Act?

"3. If the answer to either or both of the above questions is in the affirmative, are there limiting circumstances under which either condition of condominium separation would not constitute a subdivision under the Act?

"Section 11,552 requires that I as the Advisory Agency, 'report on the map or maps of any subdivision submitted to it within 30 days after the tentative map has been filed and the report shall approve, conditionally approve or disapprove the map or maps of the subdivision'.

"Enclosed is a set of the prints for your inspection; please return them when you no longer need them."

Mr. Wright's transmittal letter, to which you refer, reads:

"For your approval we send you herewith 11 copies of the Tentative Map, composed of 22 sheets, of the vertical subdivision of 'The Hamilton', formerly known as the Alexander Hamilton Hotel Apartment located at 631 O'Farrell Street in 50 Vara Block 283.

"Because this is an unusual type of subdivision we add the following information for your use:

"This building was designed by Architect Albert H. Larsen, the drawings of which are dated June 12, 1929 and are on file in the office of Building Permits.

"This subdivision is proposed for condominium purposes."

The tentative map of The Hamilton states that it is a resubdivision of 50 Vara Block 283.

Sheet 1 of the tentative map shows the property of The Hamilton in relation to adjacent property. Sheets 2 and 3 show the basement and first floor as "Common Area." Sheets 4 to 22 designate the different apartments on the second to twenty-first floors. Each of sheets 4 to 21 bears this notation:

"The property lines of each Apartment are the interior unfinished surfaces (exclusive of paint, paper, wax, tile, enamel or other finishing) of the perimeter walls, bearing walls, floors, ceilings, windows and doors thereof.

"All Apartment dimensions are along the unfinished interior wall surfaces.

"All Apartment tie dimensions are from the boundary of the subdivided property to the Apartment unfinished wall surface.

"All lands and all portions of the Subdivided Property except the Apartments constitute part of the 'Common Areas.'

"All floors, bearing walls and columns located within an Apartment, to the unfinished surfaces thereof, and all elevator equipment and shafts, central heating, roofs, foundations, pipes, ducts, flues, chutes, conduits, wires and other utility installations, excluding any utility outlets located within Apartments, constitute parts of the 'Common Areas.'

"The owner of each Apartment shall own an undivided interest in the 'Common Area.'"

O P I N I O N

The tentative map of The Hamilton reflects the essential character of "condominium," namely, that separate fee interests in the respective apartments of a single structure are sold and conveyed by the owner thereof, each grantee additionally receiving an undivided interest in the building's essential structural components, its essential fixtures, improvements, and areas of common use, and its appurtenant land.

Answer to Question 1.

My answer to this question is yes.

Sections 11500 to 11640 of the Business and Professions Code constitute the Subdivision Map Act. Its purpose is to protect individual members of the public who purchase lots or homes from subdividers and to make sure that full information will be given to all purchasers concerning public utility facilities and other essential facts with reference to the land. (Westbrook v. Summerfield, Roberts and McArthur, Inc., 154 C.A. 2d 761, 766, 316 P. 2d 691.)

Subdivision (a) of section 11535 of the Business and Professions Code provides as follows:

"(a) 'Subdivision' refers to any real property, improved or unimproved, or portion thereof, shown on the latest adopted county tax roll as a unit or as contiguous units, which is divided for the purpose of sale or lease, whether immediate or future, by any subdivider into five or more parcels within any one-year period; provided, that this chapter shall not apply to the leasing of apartments, offices, stores, or similar space within an apartment building, industrial building, commercial building, or trailer park, nor shall this chapter apply to mineral, oil or gas leases."

Improvements are real property (section 104, Revenue and Taxation Code), and the land and improvements which are The Hamilton have been separately shown on the tax roll for a number of years in accordance with law. (Section 2, art. XIII, California Constitution; section 607, Revenue and Taxation Code.)

In 1951 the Attorney General held that undivided interests in land coupled with the right of exclusive occupancy of apartments located thereon - so-called "community apartment houses" - were subject to the subdivision law (17 Ops. Cal. Atty. Gen. 79), and in 1955 community apartment projects were expressly made subject to the subdivision law. (Sections 11000, 11004, and 11535, Business and Professions Code; St. 1955, p. 1924.)

It is therefore my opinion that the provisions of the Subdivision Map Act embrace vertical and horizontal subdivisions of the fee title to an improvement coupled with undivided interests in the land and other common areas.

Answer to Question 2.

My answer to this question is yes.

Answer to Question 3.

I do not think of any circumstances under which a subdivision for condominium purposes would not constitute a subdivision as that term is defined in the Subdivision Map Act,

that is, as defined in section 11535 of the Business and Professions Code. The only exception contained in the first paragraph of section 11535 is in the case of "leasing of apartments etc. within an apartment building etc." A condominium separation or subdivision for condominium purposes as those expressions are used herein means a separation or subdivision for the purpose of sale of the individual apartments in the apartment structure, as distinguished from a lease thereof, coupled with sale of undivided interests in the land and other common areas.

Subdivision (b) of section 11535 states "subdivision" does not include certain parcels of "land," but an apartment building, while it is real property, is not "land" (Civ. Code §659), and therefore subdivision (b) of section 11535 provides no exception in the case here under consideration.

You are advised accordingly.

Respectfully submitted,

THOMAS M. O'CONNOR
City Attorney

To: Mr. Reuben H. Owens
Director of Public Works
and Advisory Agency
260 City Hall
San Francisco 2, California

GEB/OIW/WFB

OPINION NO. 62-2

January 24, 1962

SUBJECT: ESTABLISHMENT OF RATE OF PAY FOR CLASS 7530 STREET CLEANER: PROCEDURES TO BE FOLLOWED REGARDING STREET CLEANERS AND OTHER CLASSES

Dear Sir:

Your request for an opinion is in part as follows:

REQUEST

"Last week members of the staff discussed with you, informally, the legality of establishing a new classification designated as #7530 Street Cleaner.
. . .

"The Commission has now instructed me to request an opinion from you as to whether the Civil Service Commission, in establishing a classification such as #7530 Street Cleaner, can legally establish during a fiscal year a rate of pay different from the rate now in effect for the classification from which the duties were taken.

"Will you also please advise me if your opinion, with regard to the legality of the rate for Street Cleaner, also affects any other classification of employment or compensation of such employment which may have been referred to you for your opinion or where legal action may be pending."

OPINION

Your staff report of December 14, 1961, indicates that "The duties of the new classification of 7530 Street Cleaner were formerly included in the classification J4 Laborer under the (duty statement) clause 'cleans and sweeps streets and removes debris.'" That same report also discloses that the city's J4 Laborer who cleaned and swept streets and removed debris had his pay established pursuant to the provisions of Charter Section 151.3, and by relation to the collective bargaining agreement entered into between the Associated General Contractors and the Building and Construction Laborers Union. That rate of pay was certified by your commission to the Board of Supervisors on or prior to April 1, 1961, and was by the Board later enacted into law to become effective July 1, 1961. During the July, 1961 modifications of rates of pay provided for by Section 151.3, changes were possible; but upon conclusion of the July modification periods, an unalterable rate of pay was provided--to persist

through June 30, 1962--for work which consisted of "cleaning and sweeping streets and removing debris." (See Miller v. City and County of San Francisco, 174 Cal. App. (2) 109, at 119). So long as that work was or will be done by a city employee between the dates July 1, 1961 and June 30, 1962, the rate of pay provided therefor in the current Section 151.3 ordinance will be applicable and should be paid.

Regarding the question presented by the last paragraph of your request, you are advised that the reasoning set forth above with regard to the street cleaner class will apply with equal force to any other class wherein a rate of pay is currently in effect pursuant to salary fixing procedures followed under the mandate of Charter Section 151.3.

Accordingly, you are advised as hereinbefore indicated with respect to the issues created by your several inquiries.

Respectfully submitted,

THOMAS M. O'CONNOR
City Attorney

TO: Mr. George J. Grubb
General Manager, Personnel
151 City Hall
San Francisco 2

WFB/BJW

OPINION NO. 62-3

January 30, 1962

SUBJECT: CIVIL SERVICE COMMISSION'S POWER TO ALLOW 15% FOR SENIORITY UNDER SECTION 146 OF THE CHARTER FOR CLASS H120 PILOT OF FIRE BOATS

Dear Sir:

Your request for an opinion is as follows:

REQUEST

"On December 8, 1961, this office posted an announcement of a promotional examination for class H120 Pilot of Fire Boats. This examination was promotional from a number of classifications in the Fire service. Copy of the examination announcement is attached.

"The scope of the examination was 900 points for a written test and 50 points for ascertained merit and 50 points for city and county service.

"After posting of the examination announcement, a protest was received from the San Francisco Fire Fighters, Local 798, and from an applicant, Thomas Kenney, Jr., requesting that the examination announcement be amended to provide 150 points for seniority and service. This request was based on the claim that Section 146 of the Charter requires the allowance of 15% of credits for seniority of service.

"The examination announcement did not provide the 15% for seniority indicated in Section 146 of the Charter, because Section 146 does not include H120 Pilot of Fire Boats as a classification for which such credits are distributed, and does not state how such credits would be allocated to the next lower ranks. Not being so listed, it is the belief of the Civil Service Commission that the 15% requirement of Section 146 does not apply to the class H120 Pilot of Fire Boats.

"In view of the question raised by the men in the department, your opinion is respectfully requested as to whether the conclusion of the Civil Service Commission that the allocation of seniority credits in the promotional examination for class H120 Pilot of Fire Boats is within the discretion of the Commission is correct. It may be noted that an examination for H120 Pilot of Fire Boats was held in 1947 on an entrance basis."

O P I N I O N

It is noteworthy that Section 146 of the Charter, after setting forth the discretionary terms under which the Civil Service Commission is authorized to hold promotional examinations for positions in the City's service, reads as follows:

> "Except as specifically provided in other sections of this charter, all promotions in the uniform forces of the police and fire departments, respectively, shall be made from the next lower civil service rank attained by examinations, as herein set forth, giving consideration also to meritorious public service and seniority of service and a clear record in the respective departments. . . . (Emphasis added.)
>
> "Fifteen per cent of the total credits obtainable under any promotive examination for eligibles for the police or fire department shall be allowed for seniority of service, which said credits shall be distributed as follows: . . . "

There then follows a statement of varying formulas to be applied by the Commission in allocating this total of fifteen per cent credits to applicants from the next lower ranks for promotions to the ranks of Lieutenant, Captain, and ranks above Captain in the Fire Department. It gives no formula for applying such credits in favor of applicants from the next lower ranks for promotion to the rank of Pilot of Fire Boats. However, inasmuch as the Commission has determined that the proposed examination for Pilot of Fire Boats, Class H120, should be promotional in character, Section 146 by virtue of its "all promotions" mandate seems to require that all qualifying applicants be permitted "fifteen per cent" of the total credit allowance for "seniority of service" and an additional six per cent of such total credits for a "clean record in the department." (See Section 146(h).)

The failure of said section to spell out the allocation problem of such credits relative to examinations for Pilots of Fire Boats probably indicates merely that such positions in the department at the time it was adopted were not then being classified as of promotional rank. Now that it has attained such rank in the judgment of the Commission, it would appear that said general mandate, considered along with rule-making power granted under Section 141 of the Charter to do "such other matters as are not in conflict with this Charter," implies an obligation on the part of the Commission to accord applicants for this promotional examination equivalent credit allowances given in other promotional examinations in the Fire Department. Evolving an equitable formula for doing this may not be considered as an insurmountable problem. (See Terry v. Civil Service Commission, 108 C.A. 2d 861, 870.)

Under these circumstances, I am, therefore, loathe to apply the statutory rule "Expressio unius est exclusio alterius" (Mention of one thing in a statute implies the exclusion of another). It is not a rule to be employed so rigidly that it defeats the plainly indicated purpose of the people in Charter Section 146 that all promotions in the Fire Department are to be given on the basis of service and seniority credits. A somewhat similar matter was before our State Supreme Court in Dickey v. Raisin Proration Zone No. 1., 24 Cal. 2d 796, in which the failure of the Agricultural Prorate Act of 1933 as amended in 1937 to delineate the general grant of power to the Program Committee as including the power to pledge raisin growers to market their raisins through a "stabilization pool" was challenged as a reason for holding the act inapplicable to such a pledge agreement. The Court, at page 811, rejected said challenge in this manner:

> "The plaintiff's interpretation of the act would restrict the program committee's control of the stabilization pool raisins to the single power to make a gift of them to charity. Manifestly in construing the type of progressive social legislation here involved, the express grant is intended not to limit, but to mark the latitude of power vested in the program committee to achieve the declared purpose of the act. To hold otherwise would be to nullify the essence of the statute by subordinating its purpose to a supposed limitation of its implemental terms. In such circumstances the maxim 'expressio unius est exclusio alterius' and other rules of construction have no application. Those rules will not be utilized to contradict or vary a clear expression of legislative intent in a matter of such vital concern to the people of the state."

Recourse is also taken to the following pertinent statement from 82 Corpus Juris Secundum 670, Note 95:

> "The expression of one thing in a statute does not exclude another thing when the other thing is expressed; nor will it generally exclude the application of the statute to things of the same class as those expressly mentioned which have come into existence since the passage of the statute."

Consequently, believing the latitude of power meant to be given the Commission under Sections 141 and 146 includes the power to award credits to newly-created promotional ranks on an equivalent and equitable basis with specifically mentioned ranks, I am of the

opinion that the Commission must include allocation of such credits in the proposed promotional examination for Pilot of Fire Boats, Class H120.

You are so advised.

Respectfully submitted,

THOMAS M. O'CONNOR
City Attorney

TO: Mr. George J. Grubb
General Manager, Personnel
151 City Hall
San Francisco 2, California

RJR/BJW

OPINION NO. 62-4

February 5, 1962

SUBJECT: RIGHT OF CIVIL SERVICE COMMISSION TO TRANSFER CITY EMPLOYEES FROM SECTION 151 TO 151.3 OF CHARTER -- POWERHOUSE OPERATORS, MUNICIPAL RAILWAY

Dear Sir:

Your letter enclosing copy of inquiry from Powerhouse Operators has been received. The enclosure reads as follows:

"It is requested that legal opinion be given regarding the right of the Civil Service Commission to transfer City employees from Section 151 to Section 151.3 of the City Charter when the employees will be adversely affected by the transfer.

"Such a transfer for Code 7364 Powerhouse Operators was recommended by the Civil Service Commission in their Tentative Salary Recommendations, January 8, 1962.

"Under Section 151.3 of the Charter the affected employees will be subject to the terms of the agreement between Local 1245, I.B.E.W., and the Pacific Gas and Electric Company.

"This agreement will deprive the Powerhouse Operators of benefits they now enjoy under Section 151 of the Charter, with no compensating benefits under Section 151.3.

"The premium pay for shift differential will be lowered from 6-1/4% to an average of 10 cents per hour, a substantial annual loss for the Operators.

"Holiday pay at time and a half will be reduced as the union contract lists only eight holidays per year, only six of which are guaranteed. Also, the 'in lieu' days off for holidays will be eliminated entirely.

"The Operators will also lack representation as Local 1245 membership is restricted solely to Pacific Gas & Electric Company employees.

"In the light of the above facts, we respectfully request a legal opinion from your office as soon as possible."

O P I N I O N

Prior to 1945 Section 151 of the City Charter contained the conventional provision that the Board of Supervisors should fix the salaries of all Municipal employees on the basis of a comprehensive investigation and survey of wages paid in private and public employment for like service. In 1945 the Charter was amended by adding Section 151.3 as a new section which was amended in 1946.

Section 151.3 of the City Charter provides inter alia as follows:

> "Notwithstanding any of the provisions of section 151 or any other provisions of this charter, whenever any groups or crafts establish a rate of pay for such groups or crafts through collective bargaining agreements with employers employing such groups or crafts, and such rate is recognized and paid throughout the industry and the establishments employing such groups or crafts in San Francisco and the civil service commission shall certify that such rate is generally prevailing for such groups or crafts in private employment in San Francisco pursuant to collective bargaining agreements, the board of supervisors shall have the power and it shall be its duty to fix such rate of pay as the compensations for such groups and crafts engaged in the city and county service."

The above Charter provision makes it mandatory upon the City to pay those employees who come within its provisions at the same rate of pay as is paid in private industry to the same groups and crafts in accordance with collective bargaining agreements.

Martin v. City and County of S.F.,
168 CA 2d 570 (1959)

The applicability of the collective bargaining agreement in question was ascertained and established by the Civil Service Commission pursuant to the provisions of Section 151.3 of the City Charter which call for the exercise of a wide and sound discretion. In making this determination the Commission has exercised the discretion placed in it by the Charter, and there appears to be no evidence of abuse of such discretion. The complaint made by Powerhouse Operators that they will be adversely affected by the application of Section 151.3 is not a valid legal objection.

In Miller v. City and County of San Francisco, 174 CA 2d 109 (1959) the Court said at pp. 111-112:

"The parties agree that the question is whether or not the commission, in fixing these rates of compensation, acted arbitrarily, whimsically and capriciously, and abused the discretion vested in it by section 151.3.

"The test to be applied, when reviewing an administrative determination of this character, has been variously stated as follows: Abuse of such administrative discretion 'must appear very clearly before the courts will interfere' (Maxwell v. Civil Service Com., 169 Cal. 336, 339 [146 P. 869]); where '"there is fair and reasonable ground for difference of opinion among intelligent and conscientious officials, the action ... should stand ... If the action of the commission is not palpably illegal, the court should not intervene."' (Pratt v. Rosenthal, 181 Cal. 158, 163 [183 P. 542]); civil service '"boards are vested with a high discretion and its abuse must appear very clearly before the courts will interfere"' (Nelson v. Dean, 27 Cal. 2d 873, 881 [168 P. 2d 16, 168 A.L.R.467]); 'Judicial interference ... is unjustified except on a showing of arbitrary, fraudulent, or capricious conduct, or a clear abuse of discretion' (Wilson v. Los Angeles County Civil Service Com., 103 Cal. App. 2d 426, 433 [229 P. 2d 406])."

The Court said at pp. 118-119:

"It is true that plaintiffs presented to the trial court a considerable amount of testimony tending to show that the work of the city machinist is more varied and arduous than that of a C.M.T.A. machinist. It is true also that they are all journeymen machinists and their job descriptions appear to be substantially the same. Equally important, especially in a review of administrative action, is this question: What information did the commission have before it each time when it made a determination? Not what is later developed and presented to a different tribunal in review of the commission's action. Included, of course, is the question whether the commission went about its work and conducted its surveys in a manner reasonably calculated to discover all the facts that might bear significantly upon the problem to be solved.

"Our examination of the record convinces us that the trial judge had before him adequate evidence upon which to base his findings and conclusions that the commission has not been guilty of arbitrary or capricious conduct or abuse of discretion, and that a sufficient showing has not been made to sanction judicial interference with the wage rate determinations and certifications made by the commission and questioned by the plaintiffs in this case."

* * *

"In the absence of an abuse of discretion upon the part of the respondents in the exercise of their powers and the discharge of their duties, the trial court's denial of relief must be affirmed."

It should be noted, that once it has been properly determined by the Civil Service Commission that the provisions of Section 151.3 are applicable, the parties are bound by the provisions found in the section.

Adams v. City and County of S.F., 94 CA 2d 586, 592. (1949)

Shift differential and holiday pay are a part of "basic rate of pay" and within the scope of Section 151.3 of the Charter. Thus the public employees involved should receive the same pay for such work that private employees receive.

In Adams v. Wolff, 84 CA 2d 435 (1948) the Court said at pp. 444-445:

"It is quite apparent that it was the intent of section 151.3 to give to the public employees of the type here involved the same take home pay received by private employees in the same industry. That means that when the public employees work on a night shift, or where a work week is interrupted by a holiday they are to receive the same pay that private employees would receive for work similarly performed. It is quite obvious that night shift pay and pay for holidays is a part of the 'basic' rate of pay, and is as much a part of the wage structure as the hourly wage itself. * * * The'basic' 'rate of pay' is the take home pay of the employee. The charter provision guarantees that the take home pay of public employees shall be the same as private employees. That obviously includes holiday and premium pay for night work."

While the loss of benefits presently enjoyed by Powerhouse Operators is unfortunate, the employees must accept the disadvantages as well as advantages when their basic rate of pay is changed in accordance with the provisions of Section 151.3.

In Adams v. City and County of S.F., 94 CA 2d 586 (1949) the Court said at p. 594:

> "It must be declared that by reason of the adoption of charter section 151.3 the city and county employee may accept not only the advantages provided thereunder but likewise must submit to the disadvantages that are incidental to its passage. The good must be accepted with the evil in changing the classification for 'rate of pay' from the provisions of section 151 to those of section 151.3. 'It must be remembered that it is not for the courts to pass upon the wisdom or policy of a charter provision.' (Adams v. Wolff, supra, p. 444.)"

It is stated in the request for opinion that the Powerhouse Operators will lack union representation if their basic rate of pay is fixed under Section 151.3 instead of 151 of the Charter since membership in Local 1245 is restricted to PG&E employees. Neither 151 nor 151.3 purport to apply to union representation. Both sections are concerned only with methods of determining rates of pay.

Adams v. Wolff, 84 CA 2d 435 (1948);

City and County of S.F. v. Boyd, 22 C. 2d 685 (1943).

You are accordingly advised that the rates of pay of Powerhouse Operators may be determined by the Civil Service Commission in accordance with the provisions of Section 151.3.

Respectfully submitted,

THOMAS M. O'CONNOR
City Attorney

TO: Mr. V. W. Anderson
General Manager
S.F.Municipal Railway
949 Presidio Avenue
San Francisco 15, Calif.

RJH/BJW

OPINION NO. 62-5

February 5, 1962

SUBJECT: RECONSTRUCTION OF PALACE OF FINE ARTS MUST INCLUDE RECONSTRUCTION OF MAIN BUILDING

Gentlemen:

You have requested that the oral opinion which I rendered to your Committee on January 31, 1962, in connection with the reconstruction of the Palace of Fine Arts be confirmed by a formal written opinion.

I advised you that under the provisions of Ordinance No. 426-59, which called and provided for the election to incur a bonded indebtedness of $1,800,000 for the Palace of Fine Arts, the reconstruction of the Palace of Fine Arts could not be limited to a reconstruction solely of the rotunda and colonnades, but must include the reconstruction of the main building.

Ordinance No. 426-59 provided for the submission to the electors of a proposition to incur a bonded indebtedness for the Palace of Fine Arts as follows:

"(c) PALACE OF FINE ARTS, 1959.

"$1,800,000 to pay the cost of additions, betterments, improvements and reconstruction of the Palace of Fine Arts within the City and County of San Francisco, <u>to provide within the structure for a small theatre, music hall, an area for work and exhibit space for visual, graphic and plastic arts, convention activities, youth activities and recreational activities, studio, office space, and all furnishings, equipment, works, properties and structures necessary or convenient for the additions, betterments, improvements and reconstruction of the Palace of Fine Arts</u>.

"That the total estimated cost of said municipal improvement as now contemplated is $5,800,000, whereof $2,000,000 has been contributed to the city and county for this specific purpose by Walter S. Johnson and $2,000,000 contributed by the State of California from the State Park Commission and the $1,800,000 from the sale of bonds authorized by the electors under this bond proceedings will constitute the sources of funds for the improvement. The estimated cost of said municipal improvement as set forth herein is not to be deemed to constitute a limitation or condition upon the issuance of bonds in the said

amount of $1,800,000, and the Board of Supervisors reserves the right to reduce the scope of the project to an estimated cost of not to exceed the principal amount of said bonds proposed to be issued or in the alternative to an estimated cost equal to the principal amount of said bonds plus any additional moneys then available from said contribution or contributions."
(Emphasis added)

The argument for Proposition "C" which was included in the ballot pamphlet submitted to the voters described the proposed reconstruction of the Palace of Fine Arts as an income-producing asset providing a six million dollar cultural, recreational and convention center.

The passage of the bond issue by the electorate of the City and County of San Francisco created a contractual relation between the electors and the supervisors of the City and County of San Francisco (County of San Diego v. Perrigo, 155 Cal.App.2d 644), which contract requires that the Palace of Fine Arts be reconstructed with the bond funds so as to provide a structure capable to be used for the purposes set forth in the ordinance calling the election.

If the main building were demolished and the reconstruction of the Palace of Fine Arts were confined solely to the rotunda and colonnades, it is obvious that the reconstruction of the Palace of Fine Arts would not be in accordance with the proposal approved by the electorate, but that a substantial portion of the improvement contemplated would be omitted. As was stated in the case of City of San Diego v. Millan, 127 Cal.App. 521, at page 530:

> ". . . the omission of a substantial portion of the improvement contemplated at the time the bonds were voted is an unauthorized departure from the purpose for which the bonds were issued."

You are therefore advised that under the provisions of Ordinance No. 426-59 the reconstruction of the Palace of Fine Arts must provide for the reconstruction of the entire Palace, to wit, the main building, the colonnades, and the rotunda, and that the elimination of the main building would be the elimination of a substantial portion of the improvement, which would preclude the use of the funds provided by the bond issue for such project.

Respectfully submitted,

THOMAS M. O'CONNOR
City Attorney

TO: Finance Committee
Board of Supervisors
235 City Hall, San Francisco

LSM/TIP

OPINION NO. 62-6

February 5, 1962

SUBJECT: BOARD OF SUPERVISORS CONSIDERATION OF RECLASSIFICATION, STATUS RIGHTS, ETC., IN ADOPTION OF SALARY STANDARDIZATION ORDINANCE

Dear Sir:

Your request for an opinion is as follows:

REQUEST

"Although the salary standardization recommendations for employees subject to the provisions of sections 151 and 151.1 of the charter will not officially reach this office until February 1, we are receiving letters thereon from city employees.

"Two letters, copies attached, received from employees in the class of I-116 Orderly refer to status rather than request increased remuneration.

"The letter from Estelle Wargo, I-116 Orderly, requests status in Jacobs classification of 2202 Dental Aide at $325-395 per month, the same salary as that recommended for I-116 Orderly. The Civil Service report shows 2202 Dental Aide is a reclassification of L-151 Dental Assistant (salary $325-395).

"The second letter from Anna Grubb, et al., I-116 Orderly, requests status in Jacobs classification 2308 Surgical Aide at $333-405 per month, compared to $325-395 per month for Orderly. The Civil Service report shows 2308 Surgical Aide as a new classification.

"As the question of status, and also that of reclassification, will most likely be brought to the attention of the Judiciary Committee during its forthcoming salary standardization consideration, will you please render an opinion on the exact powers of the Board of Supervisors with respect to employee status in classifications other than those presently held by the employees involved. Also, an opinion on the powers of the Board of Supervisors with respect to reclassifications, particularly, if the duties of a position have been reclassified to a higher rating, what are the incumbents rights thereto. In the event of a reclassification to either a higher or lower rating, can the incumbent continue to hold his particular position or could he be reassigned, without his concurrence, to other duties in accord with his classification either in the same department or another department?

"Salary standardization hearings will commence on February 5, and receipt of your response on or before that date will be appreciated."

O P I N I O N

The hearings which you refer to in your request, which will commence on February 5, 1962, are committee hearings on the proposed Salary Standardization Ordinance for the fiscal year 1962-63. According to Section 151 of the Charter such an ordinance must be enacted at least every five years commencing with 1944, and more frequently when the Board of Supervisors or the Civil Service Commission determine that "economic conditions have changed to the extent that revision of existing schedules may be warranted in order to reflect current prevailing conditions . . . " Furthermore, in order for the rates of pay to be effective for the next ensuing fiscal year this ordinance must be finally passed by April 1st.

The pertinent portions of Section 151 which govern the action of the Board of Supervisors and the Civil Service Commission read as follows:

> "The board of supervisors shall have power and it shall be its duty to fix by ordinance from time to time, as in this section provided, all salaries, wages and compensations of every kind and nature, except pension or retirement allowances for the positions, or places of employment, of all officers and employees of all departments, offices, boards and commissions of the city and county in all cases where such compensations are paid by the city and county.
>
> * * * * * *
>
> "In fixing schedules of compensation as in this section provided, the civil service commission shall prepare and submit to the board of supervisors and the board shall adopt a schedule of compensations which shall include all classifications, positions and places of employment the wages or salaries for which are subject to the provisions of this section; provided, that the civil service commission shall from time to time prepare and submit to the board of supervisors and the board shall adopt amendments to the schedule of compensations which are necessary to cover any new classifications added by the civil service commission . . . ."

The language quoted above limits the Salary Standardization Ordinance to fixing the salaries of the positions and places

of employment where the compensation is paid by the City. Since this ordinance is limited to rates of pay that shall be paid to occupants of the various positions created and continued in each annual or supplemental appropriation ordinance, it is in no way concerned with individuals occupying these positions but only with the salary that attaches to the positions, and the problems referred to in your request are not a proper subject at this hearing.

The powers of the City and County of San Francisco are vested primarily in the Board of Supervisors. This authority, however, is subject to the provisions of Section 9 of the Charter, which states that the Board of Supervisors cannot exercise any power which is reserved to the people or delegated to other officials, boards or commissions by the Charter. The Charter language has placed the authority to classify, reclassify or allocate, in accordance with duties and responsibilities, positions to the various classes of the classification in the Civil Service Commission through the enactment of Section 141 thereof which reads in part as follows:

> "The commission shall classify, and from time to time may reclassify, in accordance with duties and responsibilities of the employment, and training and experience required, all places of employment in the departments and offices of the city and county not specifically exempted by this charter from the civil service provisions thereof, or which may be created hereafter by general law and not specifically exempted from said civil service provisions. The commission shall likewise classify all other positions or other places of employments in the city and county service specifically exempted from the civil service provisions of this charter, but which, by the provisions of section 151, thereof, are made subject to classification for salary standardization purposes on the basis of duties and responsibilities of the employment, and training and experience required. <u>The civil service commission shall be the judge of such classification.</u>
>
> "<u>The commission shall also, in accordance with duties and responsibilities, allocate, and from time to time may reallocate, the positions to the various classes of the classification.</u> The allocation or reallocation of a position shall not adversely affect the civil service rights of an occupant regularly holding such position. No person shall hold a position outside of the classification to which he has been appointed, provided that every employee of any department or office shall discharge any of the duties pertaining to such department or office to which his chief may temporarily assign him.

"The class titles and class numbers assigned to positions by the commission shall be used in all records, reports, statements and communications, including the compensation schedule, annual budget and salary ordinance, payrolls, and appropriation ordinances." (Emphasis added.)

Continuing, Section 141 delegates additional authority to the Civil Service Commission to adopt rules relating to "classifications." In Rule 1 of the Rules of the Civil Service Commission the Civil Service Commission has exercised this authority and has classified all the positions in the City service over which it has jurisdiction pursuant to Section 141. As a result of the recent city-wide survey amendments have been made to the manual referred to in Section 8, Rule 1, in accordance with the procedure in Section 7, Rule 1. These concern primarily the titles of positions and the description and duties of existing positions as well as newly created positions. Since the Civil Service Commission has exercised the power conferred upon it by Section 141 and enacted this rule, its determination is binding upon all other departments of the City as to classification of positions. The District Court of Appeal has held that rules of the Civil Service Commission have the same force and effect as provisions of the Charter. (See Vinex v. Civil Service Commission, 59 C.A. 2d 458, 465.) Therefore as to classifications of positions the Board of Supervisors is bound by the classes fixed by the Civil Service Commission, but has the power to fix the maximum number of each class of employment in each of the various departments of the City and County and to fix rates of compensation therefor as provided in this Charter. (Section 9)

Your request further refers to status rights. Since status rights flow from the similiarity of duties and responsibilities that a person has at the time the position is reclassified, its determination is likewise exclusively within the province of the Civil Service Commission.

You have further directed inquiry to me relative to the rights of persons whose positions have been reclassified either to higher or lower classifications. I advise you that such decisions can be determined only by the Civil Service Commission subject to the language of Section 141 which states, "The allocation or re-allocation of a position shall not adversely affect the civil service rights of an occupant regularly holding such position." (Emphasis added.) This provision of Section 141 means that any person who regularly occupies a position cannot be affected adversely so long as he continues in that position.

However, if your inquiry concerns the departmental rights of persons holding positions which have been reclassified, then I must advise you differently. Section 19 of the Charter provides:

"The board of supervisors and each board and commission appointed by the mayor, or otherwise provided by this charter, shall have powers and duties as follows:

"(a) To prescribe reasonable rules and regulations not inconsistent with this charter for the conduct of its affairs, for the distribution and performance of its business, for the conduct and government of its officers and employees, and for the administration, custody and protection of property under its control and books, records and papers appertaining to its affairs. The board of supervisors, by ordinance, may provide that rules and regulations of any board or commission, or general orders of any department head issued by authority of any board or commission that are of general public concern shall be published or posted."

Therefore an appointing officer has the sole authority to transfer a person within his department from one job to another so long as he does not permanently work such person out of his classification.

No employee may be transferred from one department to another, however, without his consent. Transfers from one department to another are controlled exclusively by the Civil Service Commission pursuant to Section 141 where they are given rule-making powers concerning "transfers." The Civil Service Commission has exercised this power in its adoption of Rule 34 of its Rules. This rule requires that before an interdepartmental transfer may be made the individual desiring the transfer must make a request to be transferred.

You are advised accordingly.

Respectfully submitted,

THOMAS M. O'CONNOR
City Attorney

TO: Mr. Robert J. Dolan
Clerk of the Board
235 City Hall
San Francisco 2, California

BJW/TJB

OPINION NO. 62-7

February 7, 1962

SUBJECT: HOLDOVER - TEMPORARY APPOINTEE, CREATION OF BY RULE OF COMMISSION

Gentlemen:

Your request for an opinion is as follows:

R E Q U E S T

"In certain classifications of employment there are a number of eligibles who have served a considerable period of time under temporary appointment in various departments. As eligible lists expire, many of these temporary appointees have successfully competed in succeeding examinations and have thus maintained eligibility for such continued temporary appointment. Since these persons represent a valuable corps of experienced employees for seasonal work which recurs year after year, the present practice of requiring such persons to requalify through further examinations every two or four years is wasteful and should be unnecessary. Further, the services of some of these appointees are lost because of failure to re-establish eligibility in new examinations for one reason or another. Experience has also indicated that in many of these instances there would be no need to hold an examination except for the necessity of having eligibles available for this periodic employment.

"It is our thought that this problem could be satisfactorily resolved if the Civil Service Commission could provide a continuing eligibility status for eligibles who have served a reasonable period of time under temporary appointment.

"If an appointee to a permanent position is laid off after having completed a probationary period, he is granted special 'hold-over' status in accordance with Section 5, Rule 26, of the Commission. Under the general powers of the Civil Service Commission, may the Commission afford a similar type of 'hold-over' status to an eligible who has served satisfactorily under temporary appointment for a period of one year? Attached is a draft of a proposed addition to Rule 26 'Reduction in Force' - Section 5-a (New) 'Holdovers - Temporary Appointees'. Does the Civil Service Commission have authority to adopt this proposed rule?"

Your attached draft of the proposed amendment to Rule 26 reads as follows:

"RULE 26 - REDUCTION IN FORCE

(New Section 5(a))

"Section 5(a). HOLDOVERS - TEMPORARY APPOINTEES: An eligible who has been certified to a temporary position from a regular eligible list and has satisfactorily served under full time temporary appointment from such eligible list for a period or periods of one year or more during the life of such eligible list shall, be termed a 'holdover-temporary appointee', and thereafter, according to his standing on a temporary holdover list, shall have the right and shall be preferred over eligibles on eligible lists for continued certification to temporary appointments, and such right and preference shall continue as long as the temporary holdover serves satisfactorily under temporary appointment in such class for six months or more in any one year."

O P I N I O N

The civil service provisions of the Charter, considered generally, provide a broad framework within which the Civil Service Commission is given discretion to operate in making merit and fitness as shown by appropriate tests, and as supplemented by seniority of experience and a clean record, the basis for filling entrance or promotional positions in the city's service. Section 141 prescribes the Commission's rule-making power within such framework, which includes determination of such questions as "eligibility; duration of eligible lists; certification of eligibles; . . . lay-offs or reduction in force, both permanent and temporary, due to lack of work or funds, retrenchment, or completion of work; the filling of positions, temporary, seasonal and permanent."

Thus, pursuant to its broad purpose and duty, the Commission is empowered to exercise a wide discretion in determining how temporary positions shall be filled. Its decision is not subject to judicial interference unless it shows arbitrariness, unreasonable discrimination, capriciousness, or clear abuse of discretion. (See Almassy v. Dean, 27 Cal. 2d 873, 881; Dierssen v. Civil Service Commission, 43 Cal. App. 2d 53, 63.)

Judging the proposed amendment by such standards, it appears to me as properly related to the Commission's power to promote greater fitness and efficiency in the city's service through the medium of rewarding on-the-job experience. I would suggest, however, in fairness to the quality of individuals who become available on new eligible lists, that the holdover status ought to be restricted to a definite period of years.

In view of the foregoing, I am suggesting that the amendment should perhaps provide substantially as follows:

Rule 26 - Reduction in Force

Section 5(a). HOLDOVERS - TEMPORARY APPOINTEES: An eligible who has been certified to a temporary position from a regular eligible list and has satisfactorily served under full time temporary appointment from such eligible list for a period or periods of one year or more during the life of such eligible list, shall be termed a "Holdover-Temporary Appointee", and thereafter for a period of _____ years, shall have the right and shall be preferred over eligibles on eligible lists for continued certification to temporary appointments, and such right and preference shall continue so long as the temporary holdover serves satisfactorily under temporary appointment in such class for six months of each year of said _____ year period.

You are advised accordingly.

Respectfully submitted,

THOMAS M. O'CONNOR
City Attorney

To: Civil Service Commission
Attn: Mr. George J. Grubb
General Manager, Personnel
151 City Hall
San Francisco 2, California

RJR/BJW

OPINION NO. 62-8

February 14, 1962

SUBJECT: LEGALITY OF CONTRACT CLAUSE RE WITHHOLDING FINAL PAYMENT CONDITIONAL UPON CONTRACTOR PAYING HAULING FEES IMPOSED BY ANY MUNICIPALITY

Dear Sir:

Your request for an opinion is as follows:

REQUEST

"The Utilities Engineering Bureau has been requested by the City of Millbrae to include the following provision in contracts for construction at San Francisco International Airport which involve dirt hauling:

> 'Final payment will not be made until the Contractor presents evidence satisfactory to the City (San Francisco) that all hauling fees imposed by any municipality in connection with this contract have been paid.'

Your opinion is requested as to the legality of including this clause in future contracts."

OPINION

In the absence of evidence to the contrary the City and County of San Francisco would have the right to rely on the legal presumption that contractors performing work pursuant to a contract with the City would obey the laws of the jurisdiction where the work is performed. (California Code of Civil Procedure, Section 1963 (33)) Further, the contractor performing work for the City pursuant to an airport construction contract would not be an agent of the City but an independent contractor. (Skelton vs. Fekete (1953) 120 CA (2) 401) The City would not be legally responsible for the acts of the independent contractor.

The provision which the City of Millbrae requests would be in the nature of a gratuitous assist to it by the City and County of San Francisco. The legal responsibility for the enforcement of a local law would rest with the jurisdiction which enacted it.

In spite of the fact that it is not San Francisco's legal duty to incorporate the suggested provision in its Airport contracts, the provision can be incorporated should San Francisco desire to do so. The general policy of the law is to give effect to every valid provision of a contract not unlawful or against

public policy. (Atlas Finance Corp. vs. Kenny, (1945) 68 CA(2) 504) There is nothing apparent in this provision which would render it unlawful or against public policy.

The readily apparent motive of this provision has the desirable result of assisting a governmental entity in the enforcement of its duly enacted legislation. This brings up the question of whether or not an affected municipality would acquire a sufficient public interest by reason of the provision which would create an obligation on the part of San Francisco to see that these fees are collected before final payment is made. It is my opinion that such an obligation is not created. However, in order to prevent any future misunderstanding as to the legal responsibility of San Francisco I would suggest that a sentence be added to the provision so that it will read as follows:

> "Final payment will not be made until the Contractor presents evidence satisfactory to the City (San Francisco) that all hauling fees imposed by any municipality in connection with this contract have been paid. This condition is not intended to impose any obligation whatsoever on the part of the City (San Francisco) to any municipality for the payment of hauling fees and should the final payment be made to Contractor for any reason in the absence of the payment of said hauling fees the City (San Francisco) assumes no responsibility or obligation for the payment or collection of said fees."

You are advised accordingly.

Respectfully submitted

THOMAS M. O'CONNOR
City Attorney

TO: Mr. O. L. Moore
General Manager
Hetch Hetchy Water Supply
Power and Utilities Engineering Bureau
425 Mason Street
San Francisco 2, California

TATJR/JJS

OPINION NO. 62-9

February 19, 1962

SUBJECT: RATES OF PAY FOR GARDENERS AND SUB-FOREMAN GARDENERS BEING SET PURSUANT TO SECTION 151 OF THE CHARTER

Dear Sir:

Your request for an opinion is as follows:

REQUEST

"Rates of pay for 058 Gardener and 060 Sub-Foreman Gardener have been previously set by the Board of Supervisors under the provisions of Section 151.3 of the Charter. This year the report and recommendation of the Civil Service Commission shows that these two classes are being recommended under the provisions of Section 151 of the Charter. The effect of this recommendation and report would be that if the Board of Supervisors adopts it, the rate of pay would then become effective on July 1, 1962.

"The Judiciary Committee will appreciate receiving your opinion on the legality of setting rates for Gardener classifications under Section 151 of the Charter."

OPINION

The question presented in your request concerning the legality of setting of rates of pay for 058 Gardener and 060 Sub-Foreman Gardener pursuant to Section 151 is controlled by the facts and data reported to you by the Civil Service Commission.

Prior to the enactment of Section 151.3 the setting of rates of pay for miscellaneous employees, with certain exceptions not of any importance here, was controlled by Section 151. Since the adoption of Section 151.3 the Civil Service Commission has been charged with the duty and obligation to ascertain, each year,

whether sufficient facts and data are available to require it to certify that a particular group or craft comes within the provisions of Section 151.3.

The elements necessary to require the certification by the Civil Service Commission to the Board of Supervisors under Section 151.3 are as follows:

1. The establishment of a rate of pay for a group or craft through collective bargaining between the group or craft and the employers of such group or craft.

2. The recognition and payment of this rate throughout the industry and establishments employing such group or craft in San Francisco.

Unless the Civil Service Commission finds these facts to exist and makes the certification of these facts, the rate of pay for any particular group or craft may not be set by the Board of Supervisors under the provisions of Section 151.3 of the Charter.

The Civil Service Commission represents that it has been unable to determine that a rate of pay has been established through collective bargaining agreements for a majority of persons in private employment doing the work performed by the occupants of the classes 058 Gardener and 060 Sub-Foreman Gardener. The record shows that as to these classes the Civil Service Commission has included them in its report and recommendation under Section 151 of the Charter.

On the other hand, representatives of the occupants of these positions have presented evidence to the Board of Supervisors which is at variance with the report and recommendation of the Civil Service Commission. They also represent that the case of Crockett vs. City and County of San Francisco, Superior Court No. 464228, controls the action of the Civil Service Commission since the court found in that case that the facts supported a conclusion of law that these classes were entitled to have their rate of pay fixed under Section 151.3. However, the Civil Service Commission represents that the conditions found by the court to be true in the Crockett case no longer obtain.

If in the opinion of the Board doubt has been raised by these representations,then they should be referred to the Civil

Service Commission with the request that it comment to the Board on them and report any further information that it may have obtained which would further substantiate its report and recommendation that the compensations to be paid to these classes are subject to the provisions of Section 151.

Therefore, I advise you that the legality of the rate fixed is dependent upon the Civil Service Comission properly performing its duties under the provisions of Section 151 and Section 151.3. The Board, however, has no power to establish a rate of pay under Section 151.3 unless there has been a certification by the Civil Service Commission thereunder as above indicated.

Respectfully submitted,

THOMAS M. O'CONNOR
City Attorney

To: Mr. Robert J. Dolan
Clerk of the Board
Room 235, City Hall
San Francisco 2, California

BJW/TJB

OPINION NO. 62-10

February 20, 1962

SUBJECT: CLOSING OF STREET AT O'FARRELL AND BUCHANAN IN CONNECTION WITH I.L.W.U. PROJECT IN WESTERN ADDITION

Dear Sir:

Your request for an opinion is as follows:

REQUEST

"At the meeting of the Streets Committee of the Board of Supervisors yesterday, some questions came up concerning the closing of O'Farrell and Buchanan Streets in relation to the I.L.W.U. Project in the Western Addition.

". . . I would greatly appreciate any advice you could give me on the following questions:

"1) Does the City and County of San Francisco -- and thus the Board of Supervisors -- have a binding legal obligation to transfer the above street areas to the Redevelopment Agency, or not?

"2) Could the Board of Supervisors refuse to transfer said street areas, and what would happen if they did so refuse?

"3) Could the City allow the I.L.W.U. to use these streets by granting them a revocable permit?"

OPINION

1) The City and the Redevelopment Agency entered into a Cooperation Agreement respecting the Western Addition on June 12, 1956. The agreement provides inter alia:

"7. The City further agrees that, subject to applicable law and the policies and procedures established under its Charter and existing codes and regulations, it will aid and cooperate in the undertaking of the Project by:

"(a) Vacating those rights-of-way indicated on Map B, Part II, entitled Site - Preparation Plan - Streets and Highways and conveying any of its property on such vacated streets area to the Agency."

Section 9 of Ordinance No. 9708 (Series of 1939) passed May 31, 1956, provides inter alia:

"In order to implement and facilitate the effectuation of the Redevelopment Plan hereby approved, it is found and determined that certain official action must be taken by the City and County of San Francisco with reference among other things to:

"2. Vacating those rights-of-way indicated on the accompanying Map entitled Streets and Highways, and conveying any of its property in such vacated street area to the Redevelopment Agency."

Map B, Part II of the Redevelopment Plan contained in Ordinance No. 9708 (Series of 1939) and referred to in paragraph (a) of the Cooperation Agreement was amended by Ordinance Nos. 22-61 and 198-61 passed January 27 and July 31, 1961, respectively. As amended Map B, Part II provides for the vacation of those parts of O'Farrell and Buchanan Streets herein involved. Thus there is a contractual obligation on the part of the City pursuant to the Cooperation Agreement to vacate such streets and to convey any of its property in such vacated streets to the Agency.

Redevelopment Agency of the City and County of San Francisco v. Superior Court, 195 A.C.A. 646 (1961);

Housing Authority v. City of Los Angeles, 38 C. 2d 853 (1952).

2) Should the Board of Supervisors refuse to vacate the streets and transfer the area in question, the Redevelopment Agency might bring an action in mandamus to compel such action on the part of the City.

Housing Authority v. City of Los Angeles, 38 C. 2d 853 (1952).

3) Should the City and the Agency mutually agree to delete the provisions respecting vacation of such streets from the Redevelopment Plan, the City could properly grant a revokable permit to the I.L.W.U. permitting it restricted use of such streets for a parkway open to pedestrian travel. It should be noted that the property which would be acquired by the I.L.W.U. abuts the streets involved.

Section 24 of the City Charter provides as follows:

"The board of supervisors shall regulate, by ordinance, the issuance and revocation of licenses and permits for the use of, obstruction of or encroachment on public streets and places, ..."

City Attorney's Opinions No. 3290, dated August 12, 1941, and No. 1476, dated October 11, 1960;

Simpson v. City of Los Angeles, 4 Cal. 2d 60 (1935);

In re Peterson, 51 C. 2d 177 (1958).

You are advised accordingly.

Respectfully submitted,

THOMAS M. O'CONNOR
City Attorney

To: Honorable Roger Boas
Supervisor of the City and County of San Francisco
235 City Hall
San Francisco 2, California

RJH/TJB

OPINION NO. 62-11

February 20, 1962

SUBJECT: NUMBER OF MEMBERS TO BE ELECTED TO COUNTY CENTRAL COMMITTEE IN THE CITY AND COUNTY OF SAN FRANCISCO

Dear Sir:

Your request for an opinion is as follows:

REQUEST

"The State Elections Code was recodified and further amended at the 1961 session of the State Legislature. As the result of amendment an apparent conflict exists between Sections 8401 and 8403:

"8401. 'In any city and county the county central committee of each party shall be elected by assembly districts and shall consist of five members elected from each assembly district in the city and county.'

"8403. 'In any county containing more than four and less than 20 assembly districts, the county central committee shall be elected from assembly districts and shall consist of six members elected from each assembly district.' (Amended by Stats. 1961, Chap. 412.)

"San Francisco now has 5 Assembly Districts. Section 8407 requires that I compute the number of members allotted to each district in the first week of March. In making this computation, should I apply the more specific Section 8401 or the later legislation contained in Section 8403."

OPINION

In answer to your question as to which statute should be applied, I advise you that Section 8401 of the Elections Code is applicable to the City and County of San Francisco.

Sections 8401 and 8403 of the Elections Code were recodified by the last session of the Legislature without change during the earlier part of the session. At that time both sections authorized 5 members to be elected from each assembly district in

any city and county or any county with more than 5 assembly districts. Subsequently Section 8403 was amended by Chapter 412, Statutes 1961 changing the classification of districts from "more than 5 and less than 20" to "more than 4 and less than 20" districts, and raising the number of committeemen from each district to 6 members rather than 5 members.

In addition to this, Section 14 of the Elections Code states that "county" includes "city and county". Thus there is an apparent conflict between the two sections which can be resolved by applying rules of statutory construction.

In construction of statutes where ambiguity exists certain rules have developed which aid in determining which statute applies. In People v. Breyer, 139 Cal. App. 547, 550, the court stated:

> "It is the general rule that where the general statute standing alone would include the same matter as the special act, and thus conflict with it, the special act will be considered as an exception to the general statute whether it was passed before or after such general enactment. Where the special statute is later it will be regarded as an exception to or qualification of the prior general one; and where the general act is later the special statute will be considered as remaining an exception to its terms unless it is repealed in general words or by necessary implication."

See also In re Williamson, 43 Cal. 2d 651.

In Clements v. T. R. Bechtel Co., 43 Cal. 2d 227, 233, the Supreme Court stated:

> "The presumption obtains that every word, phrase and provision employed in a statute is intended to have meaning and to perform a useful function and it is not to be supposed that the Legislature used language in a sense which would defeat the only purpose and render nugatory an important provision of the act."

Section 8401 relates to a city and county and since San Francisco is a city and county it is a specific section relating to San Francisco. Section 8403 applies to any county with more than 4 and less than 20 assembly districts and accordingly is a general section as to the type of county described. In addition to Sections 8401 and 8403 the Legislature has enacted statutes governing the number of committeemen

to be elected in counties with 4 or less, or with 20 or more assembly districts. (See Elections Code, Sections 8402, 8404, and 8405.) For instance Los Angeles County, with more than 20 assembly districts, elects 7 committeemen from each of its districts. (See Elections Code, Section 8402.)

The Legislature, therefore, has set up different classifications for the purpose of establishing the number of county committeemen that shall be elected in all counties. Section 8403 is a general statute dealing with counties of more than 4 but less than 20 assembly districts. Since Elections Code Section 14 defines the term county to include city and county, unless the Legislature has specifically excepted a city and county, Section 8403 would apply to San Francisco. The Legislature has specifically excepted the City and County of San Francisco from the provision of Section 8403 by its enactment of Section 8401 which determines the number of committeemen to be elected from each assembly district in a city and county.

You are advised as Registrar of Voters that you should apply Section 8401 in your computation allowing for 5 members.

Respectfully submitted,

THOMAS M. O'CONNOR
City Attorney

TO: Mr. Chas. A. Rogers
Registrar of Voters
167 City Hall
San Francisco 2, California

RAK/BJW

OPINION NO. 62-12

February 20, 1962

SUBJECT: SALARY STANDARDIZATION ORDINANCE, ADMINISTRATIVE PROVISIONS THEREOF, LEGALITY RE INCREMENTS THEREIN

Dear Sir:

Your request for an opinion is as follows:

REQUEST

"The Civil Service Commission has recommended the following two paragraphs for inclusion in the administrative provisions of the salary standardization ordinance.

"Section IX (C) Provided that an increment earned on the basis of completion of the required time, shall not be granted to an employee if the appointing officer shall certify that the services of said employee have been substandard; provided that an employee who was denied a salary increment by his appointing officer, may appeal such denial to the civil service commission; and provided further than an appointing officer shall not certify that the services of an employee have been unsatisfactory upon the completion of two successive increment periods unless said appointing officer shall take disciplinary action against the employee.

"Section IX (F) An employee who is suspended for five days or more in a six-month increment period, or for ten days or more in a one-year increment period, shall not receive the increment otherwise due to him.

"Will you please advise the Judiciary Committee whether the enactment of these two provisions would be an improper delegation of power in that they conflict with charter provisions which provide that the Board of Supervisors shall determine rates and schedules of compensation for city employees."

OPINION

The existing salary standardization ordinance provides that scheduled advances in salary be granted to an employee upon his having served a prescribed length of time. The proposed amendments would add the further condition that the employee's service be adjudged not "substandard" or "unsatisfactory" either by certification of his appointing officer or by his having been

suspended from his employment for more than a prescribed length of time (through disciplinary action of the appointing officer) during the increment period.

Your question relates to a possible conflict between the proposed amendments and Charter Section 151 requiring that compensation for positions be determined by the Board of Supervisors, insofar as the proposed legislation permits an act of the appointing officer to prevent an employee from receiving an increment, and so in effect determine his rate of compensation.

Section 151 of the Charter provides in part that:

> ". . . Under the schedules of compensation recommended by the civil service commission and adopted by the board of supervisors as herein provided . . . for those classifications of employment in which the practice is customary, the proposed schedules of compensation shall provide for minima, intermediate, and maxima salaries <u>and for a method of advancing the salaries</u> of employees from the minimum to the intermediate and to the maximum with due regard to seniority of service . . . ." (Emphasis added.)

Under the terms of this section, the Board of Supervisors must fix all rates of compensation, and where increments in salary are included, provide for a "method" whereby the scheduled advances may be allowed. When it adopts the salary schedules, the Board of Supervisors fixes rates of compensation and the conditions under which increments may be allowed. Under the proposed legislation when an appointing officer certifies that the conditions precedent to earning an increment have not been met, he has done no more than report his findings of fact concerning the conditions imposed by the Board of Supervisors. The consequence of the employee's failure to fulfill the conditions were predetermined by the Board of Supervisors and the appointing officer's act has not affected the established rates of compensation.

It is therefore my opinion that the proposed amendments are not in conflict with the power of the Board of Supervisors under Section 151.

However, as written, the proposed amendment, Section IX (C) presents an additional question of law. It provides that if the appointing officer certify to the "substandard" service of an employee, the increment shall not be granted.

In order to ascertain "substandard" a "standard" must first be established. Webster's New International Dictionary, Second Edition, defines the word "standard" both in its noun and adjective forms as follows:

> "standard, n. . . . 4. That which is set up and established by authority as a rule for the measure of quantity, weight, extent, value, or quality;... 5. That which is established by authority, custom, or general consent, as a model or example; criterion; test; . . .
>
> "standard, adj. 1. Being, affording, or according with, a standard for comparison and judgment; . . . . 2. Hence; having a recognized and permanent value; . . . ."

It defines the prefix "sub-" as follows:

> "sub- . . . A prefix signifying, in general, under, below, beneath, . . . Specif.: 1. a. In many words, mostly of Latin origin, sub- has the sense of under, beneath, below, down; . . . b. In many English formations, . . . and in a few words of Latin origin, sub- expresses in an inferior degree, an imperfect or partial state, somewhat, slightly, less than usual or normal, almost, nearly; . . ."

The proposed amendment contains no reference to criteria by which the employee's services are to be evaluated. The appointing officer, thereby, cannot validly certify to the unsatisfactory or substandard performance or service of an employee, however objectionable he may believe it to be, unless the Board of Supervisors (upon recommendation of the Civil Service Commission in accordance with the provisions of Section 151 of the Charter) has provided a standard.

A standard must be established by the Board of Supervisors before the appointing officer can adjudge any employee service "substandard" or otherwise "unsatisfactory."

It has long been recognized by the courts of this state, as elsewhere, that in the complexities of legislation many matters of fact-finding and application of existing rules must be dealt with by administrative employees or other government officials directly concerned with the subject of law-making, and while certain discretionary powers reserved to the legislature cannot

lawfully be delegated, many functions incident to an established policy or purpose may better and properly be performed by an administrative or ministerial officer. 30 Cal. Jur. 2d 573 contains the following language:

> "§18. -- Delegation to Ministerial or Administrative Boards. -- Although it is asserted as a cardinal principle of constitutional law that the legislature cannot delegate to any other agency its primary and exclusive power to make laws, unless such power of delegation is conferred by the constitution itself, nevertheless the legislature's inability to discharge the legislative function in all its details has compelled the courts to modify this principle in practical application. Consequently, the rule that broad sub-legislative functions may be delegated to administrative agencies is now accepted without question, and such delegation has been sustained in numerous cases. The rule evolved is that though the delegation of an uncontrolled discretion is invalid, yet if the legislature lays down a sufficiently clear test or standard, discretion to carry out a given legislative purpose or policy may be conferred on a board or officer. Furthermore, the legislature's power to delegate extends to those non-legislative powers which it can exercise as incidental and subordinate to its own. This rule is of fundamental importance in regulating the pursuit of particular professions or occupations involving skill, special knowledge, and experience. . . ." (Emphasis added.)

In Dominguez Land Corp. v. Daughtery, 196 Cal. 468 (238 Pac. 703), the court held that an administrative officer could properly determine whether the facts of a case brought it within an established standard prescribed by the legislature for the officer's guidance, but an administrative officer could not be granted plenary power to exercise his own discretion in such matters; and in Tarpey v. McClure, 190 Cal. 593 (213 Pac. 983), it was similarly held that while a large measure of discretion may be given to an administrative officer in such instances, its exercise must be controlled by rules prescribed by the legislature.

I am, therefore, of the opinion that the Board of Supervisors may properly delegate to the appointing officer the duty of comparing the service of any employee with the standard of performance of service theretofore laid down for his guidance by the Board of Supervisors, and within the limited area of

discretion thus prescribed, certify that such record of service of performance has failed to satisfy or meet the established test or standard, if such is the case.

The problem concerning "delegation" discussed above is not present in proposed Section IX (F). However, a question here may relate to conflict with that portion of Section 154 of the Charter dealing with loss of pay during suspension in that the suspended employee would suffer a loss of increment in salary (which he might otherwise have earned) as well as a loss of pay for the period of suspension.

The penalties prescribed in Section 154 for disciplinary purposes involve loss of current salary only; the increment in salary to which an employee might become entitled as a reward for meritorious service under the proposed legislation could not become vested until conditions precedent to the granting of the increment had been fulfilled. Failure to perform services in satisfaction of a prescribed standard would only operate to prevent the employee from qualifying for the advance in salary offered as an inducement to meritorious service and would not operate to deprive him of any salary to which he was then entitled.

My final word of advice relates to the failure of the proposed ordinance amendment to limit the time within which an employee may appeal his appointing officer's certification as to his unsatisfactory employment; it is my opinion that in this regard the legislative body should specify a reasonable time within which appeal must be made so that the facts may be promptly reviewed.

You are advised accordingly.

Respectfully submitted,

THOMAS M. O'CONNOR
City Attorney

To: Mr. Robert J. Dolan
Clerk of the Board
235 City Hall
San Francisco 2, California

PJDiN/BJW

OPINION NO. 62-13

February 26, 1962

SUBJECT: BOARD OF SUPERVISORS; WHETHER MEMBER IS DISQUALIFIED FROM VOTING WHERE HIS RELATIVE REPRESENTS PERSONS INTERESTED IN LEGISLATION

Gentlemen:

Your request for an opinion is as follows:

REQUEST

"At the meeting of the Board of Supervisors held yesterday, the possibility was suggested that when the Board again considers the proposed ordinance to restrict building heights in the northern waterfront area, at least two members of the Board may ask to be excused from consideration of and voting on said legislation by reason of possible conflict of interest.

"In the case of one member, Supervisor James Leo Halley, such request for excuse would be predicated upon the fact that Supervisor Halley's son, an Attorney at Law, represents owners of real property located within the area which would be affected by the height restrictions. In the case of Supervisor John Jay Ferdon, such request for excuse would be based upon the circumstance that his brother, an Attorney at Law, also represents the owners of real property in the area which would be affected.

"Said members of the Board join in requesting your written opinion in answer to the following questions:

"(a) Under the circumstances set forth above, should the members be excused from consideration and voting?

"(b) Under the circumstances set forth above, if said members were not to be excused from consideration and voting, would their participation in the legislative process invalidate the legislation enacted by the Board?"

OPINION

Opinions of my predecessors correctly set forth the common law principle that no one can vote on a question in which he has a personal or pecuniary interest. (See City Attorney's Opinions No. 4222 and 1522, dated January 10, 1949 and March 16, 1961,

respectively.) In City Attorney's Opinion No. 747, dated November 16, 1953, a review of particular instances compelling disqualification from voting was presented, together with general rules, and this latter opinion is attached hereto for your information and guidance.

Your request for opinion as to the legal effect of the instant facts marks the first occasion for consideration by this office of the analogous matter of disqualification from voting where a blood relationship exists between individual legislators and attorneys representing persons interested in pending legislation. As is the case with regard to direct personal or pecuniary interests, there is no statute deciding the question, and it must be resolved upon principles of the common law.

The general rule of common law was that a judge was not disqualified by relationship to an attorney in a cause being tried before him. (Ex parte Clanahan, 231 Ala. 87, 72 So. 2d 833, 50 ALR 2d 134; McKinney v. Fox, 309 Ky. 418, 217 SW 2d 973.) Most states, including California, have enacted statutes prohibiting judges from hearing cases where the attorneys presenting the case are close relatives, but no statute controls decision of this matter by justices of the United States Supreme Court where the general practice has been that of optional self-disqualification. (Frank, Disqualification of Judges, 56 Yale L.J. 605, 50 ALR 2d 146)

Local governments would be seriously handicapped if every possible interest, no matter how remote and speculative, would serve as a disqualification of an official (Van Itallie v. Borough of Franklin Lakes, 146 A. 2d 111, 116), and more facts tending to create bias or prejudice must, of course, be shown to preclude participation in the legislative process than to disqualify a jurist directly exercising a pure judicial function.

It is therefore my opinion, in response to your first question, that mere blood relationship, without more, between a member of the Board of Supervisors and an attorney representing parties interested in pending legislation is not sufficient, as a matter of law, to create a probability of prejudice and does not constitute grounds for disqualification from voting.

It is my further opinion, in response to your second inquiry, that if said members were not excused from consideration and voting, in the given circumstances, their participation in the legislative process would not invalidate the legislation enacted by the Board.

You are advised accordingly.

Respectfully submitted,

THOMAS M. O'CONNOR
City Attorney

TO: Board of Supervisors
235 City Hall
San Francisco 2, California

Attn: Robert J. Dolan, Clerk

OIW/TJB

OPINION NO. 747

November 16, 1953

SUBJECT: RULE OF BOARD OF SUPERVISORS REQUIRING SUPERVISORS TO VOTE; EXCUSE FROM VOTING; DISQUALIFICATION FOR PERSONAL OR PECUNIARY INTEREST.

Dear Sir:

I have your request for an opinion as follows:

R E Q U E S T

"Supervisor Christopher, in the meeting of the Board of Supervisors held on September 14, questioned the propriety of the Board's excusing one of its members from voting on a particular measure, either because of the member's personal friendship or association with individuals directly affected by special legislation, or because of the member's lack of personal knowledge of events or conditions surrounding the proposal before the Board, or because of the member's absence upon an earlier occasion when the Board voted on an issue, or for similar reasons.

"Supervisor Christopher will appreciate your indicating to him, either generally or with particularity, the conditions or circumstances which must or should exist before the Board may excuse one of its members from voting."

O P I N I O N

You are herewith referred to my Opinion No. 4222, dated January 10, 1949, in which I pointed out that it was the duty of a supervisor to vote one way or another on matters before the board unless disqualified or excused as provided in rule 39 then in effect. Since that opinion your rules have been changed and the requirement of voting is now stated in your rule No. 24 as follows:

"Every member present when a question is put shall vote for or against it. No member shall be permitted to vote upon a question unless he is in his seat when his name is called or before the vote is announced.

> "A roll call shall not be interrupted, but a member may, prior to the calling of the roll, explain his vote, or file in writing an explanation of his vote after the result of the roll call has been announced and recorded."

Your rules do not now specifically provide for excuse from voting. However, rule 24 is one of the rules that can be suspended under the provisions of rule 2 and excuse from voting is now accomplished in this manner.

There are certain situations in which a supervisor is actually disqualified from voting and in such case of course it is mandatory that the supervisor be excused. The general principle in this respect is stated in Mason's Manual of Legislative Procedure on page 368 as follows:

> "It is a general rule that no one can vote on a question in which he has a direct personal or pecuniary interest."
>
> (Also see: McQuillin Municipal Corporations, 3rd Ed. Vol. 4, p. 503; Roberts Rules of Order, p. 192.)

In Volume 62, Corpus Juris Secundum at page 761 the rule is set forth as follows:

> "It is a general rule of law that no member of a municipal council shall vote on any question involving his own character or conduct, his right as a member, or his pecuniary interest, if that is immediate, particular, and distinct from the public interest."

Specific examples of what the courts have found to be a direct personal or pecuniary interest that disqualified a vote are found in the following citations:

> "A borough councilman who had resigned voting on a resolution accepting his resignation and appointing a successor. (COMMONWEALTH v. KNAPF, 91 Atl. 553); the vote of a member of an elective municipal water board on a resolution providing for his own appointment as a construction foreman under the board (ARBEGAST v. SHIELDS, 14 S.E. 2d 4); vote of councilman on an ordinance granting a

permit to operate a filling station on property owned by councilman and leased to oil company (VAN HAVENBERG v. HOLEMAN, 144 S.W. 2d 718); vote of a councilman on ordinance providing for the construction of a spur track which was of particular benefit to a mill partly owned by the councilman (BUFFINGTON WHEEL CO. v. BURNHAM, 15 N.W. 282); vote of member of board on ordinance granting permission to corporation of which he was a stockholder to lay tracks in city streets (WEST JERSEY TRACTION CO. v. CITY OF CAMDEN, 29 Atl. 163); municipal councilman voting to accept his own resignation (STEVENS v. HAUSSERMAN, 172 A. 738); vote of member of council on resolution vacating street, said vacation being of primary benefit to employer of said member (PYATT v. MAYOR & COUNCIL OF DINELLEN, 89 A. 2d 1); vote of member of council on question of granting a property owner a variance from zoning ordinance where the council member had previously sold said property to said property owner and intended to use garage on subject premises (PIGGOTT v. BOROUGH OF HOPEWELL, 91 A. 2d 667); member of a board of trustees of City of San Diego held disqualified to vote to convey land in a quantity subject to board's discretion to a railroad corporation of which said member was a director and stockholder (CITY OF SAN DIEGO v. SAN DIEGO & LOS ANGELES R.R. CO., 44 Cal. 106); aldermen involved in election contest held disqualified to act as aldermen in determination of such contest (ROBINSON V. HAYS, 62 S.W. 2d 1007); members of village council having a pecuniary interest in a claim filed against the village held disqualified from voting to allow such claim (SMITH v. HULBELL, 106 N.W. 547); mayor's vote to beat tie on ordinance fixing his own salary held illegal (DAVIS v. CITY OF JENKINS, et al., 238 S.W. 2d 475)."

In setting forth the principle that a member should be excused from voting on a question on which he has a direct personal or pecuniary interest, as illustrated above, I have fully stated the law applicable to the subject. Mason states that it is the practice in the state legislatures to excuse a member from voting when he has a personal interest in the matter voted upon or for other good cause. Unquestionably a good cause should always be present before a member is excused from voting on any question but aside from situations where there is a personal or pecuniary interest the problem of "other good cause" is not a legal one and as far as my research reveals no court, law writer or parliamentary writer has ever essayed to categorize or even comment on what constitutes

the "other good cause" that should exist to excuse a member from voting. It is purely a matter within the discretion of the legislative body. Any attempt by me then to state either generally or with particularity what circumstances should exist before a member should be excused from voting, other than as stated above, would merely be an exposition of my concept of what your duties are as legislators to your constituents, which would of course be presumptuous of me. With particular reference to the causes set forth in your letter, personal association with individuals directly affected by special legislation could under proper circumstances disqualify a member's vote as a matter of law. As to the other reasons set forth it is entirely within the Board's discretion to determine whether they constitute cause sufficient to warrant excuse from the requirement of voting.

You are advised accordingly.

Respectfully submitted,

DION R. HOLM, City Attorney

By _____
WALKER PEDDICORD
Chief Deputy City Attorney

TJB

To: John R. McGrath, Clerk
Board of Supervisors
235 City Hall

OPINION NO. 62-14

March 2, 1962

SUBJECT: DELEGATION OF AUTHORITY TO CIVIL SERVICE COMMISSION TO WAIVE RESIDENCE REQUIREMENTS UNDER SPECIFIED CIRCUMSTANCES; LEGALITY OF

Gentlemen:

Your request for an opinion is as follows:

REQUEST

"The Judiciary Committee recommended to the full Board for consideration at yesterday's meeting a proposed ordinance, copy attached, File No. 19-62, waiving residence requirement for certain classifications and authorizing Civil Service Commission to waive residence requirement for other classifications of positions under specified circumstances.

"Supervisor Halley, at the Board's meeting, requested that we secure from you an opinion as to whether the granting of authority to the Civil Service Commission to waive residence requirement for positions under specified circumstances would constitute an illegal delegation of power.

"Your early response will be appreciated."

The pertinent portion of the proposed ordinance referred to in your letter provides as follows:

"Upon the recommendation of the commission involved, if any, or if none, of the department head concerned, the Civil Service Commission is hereby authorized to waive the residence requirements of Section 16.98 of the Administrative Code for additional classifications of positions, provided that residential requirements were waived by the Board of Supervisors for the last prior examination in said civil service class or that an examination announcement has been posted and publicized for not less than two weeks and the number of qualified applications received from resident applicants does not exceed six plus two times the number of current and definitely anticipated vacancies in the city and county service in the said civil service class for the calendar year 1962."

OPINION

It is a fundamental rule of law that a legislative body, such as the Board of Supervisors, may not delegate its power to legislate. However, it may properly delegate to a board, commission or officer the authority to perform certain ministerial acts necessary to carry out the legislative will as enunciated in an ordinance. (Gaylord v. City of Pasadena, 175 C. 433)

The basic limitation upon the power to delegate ministerial powers is that the legislation enunciate clearly the standard which is to guide the person receiving the delegation. Likewise, the legislative body may properly delegate to a board, commission or officer the power to determine the existence of the facts upon which an ordinance shall operate. (See Mecchi v. Lyon Van & Storage Co., 38 C.A. 2d 674)

The proposed ordinance referred to in your letter provides for waiver of the residence requirements of §16.98 of the Administrative Code in certain specified circumstances. The Board of Supervisors, by enacting this ordinance, would thereby declare what the law shall be.

The Civil Service Commission, on the other hand, would merely be given the authority to determine whether the conditions stated in the ordinance have been satisfied in any given case. The conditions which must be met are clearly and definitely set forth in the ordinance. If they are satisfied, the Civil Service Commission may waive the residence requirements. If they are not satisfied, there can be no waiver. (See In re Weisberg, 215 C. 624, 633)

You are advised, therefore, that the proposed ordinance does not constitute an improper delegation of authority to the Civil Service Commission.

Respectfully submitted,

THOMAS M. O'CONNOR
City Attorney

TO: Board of Supervisors
235 City Hall
San Francisco 2, California

Attention: Robert J. Dolan, Clerk

DJG/BJW

OPINION NO. 62-15

March 19, 1962

SUBJECT: RESIDENCE REQUIREMENTS OF MEMBERS OF BOARDS AND COMMISSIONS -- MEANING AND APPLICATION OF THE WORD "RESIDENT" CONTAINED IN SECTION 7 OF THE CHARTER

Dear Sir:

Your request for an opinion is as follows:

R E Q U E S T

"Will you please let me have, at your earliest convenience, a full definition and application of residence requirements, and what actually constitutes residence, for members of boards, commissions, and agencies of the City and County of San Francisco, under present laws, rules, and regulations dealing with this subject."

O P I N I O N

Section 7 of the City Charter provides as follows:

"No person shall be a candidate for any elective office, nor shall be appointed as a member of any board or commission unless he shall have been a resident of the city and county for a period of at least five years and an elector thereof for at least one year immediately prior to the time of his taking office, unless otherwise specifically provided in this charter, and every elected officer and member of any board or commission shall continue to be a resident of the city and county during incumbency of office, and upon ceasing to be such resident, shall be removed from office.

"Except for those offices and positions and officers and employees specifically provided for in this section and other sections of the charter, the residential qualifications and requirements for all officers and employees and all offices and positions in the city and county service shall be as provided by ordinance of the board of supervisors.

"All officers and employees of the city and county shall be citizens of the United States.

Residence Requirements for Elected Officers and Members of Boards and Commissions.

Elected officers and members of Boards and Commissions are required to be residents of the City and County of San Francisco prior to and during incumbency in office under Section 7 of the Charter. They may not be exempted by ordinance from the residence requirements under Section 7.

Residence Requirements for Other Officers and Employees.

Section 7 of the Charter provides that the residence requirements for all other officers and employees shall be as provided for by ordinance of the Board of Supervisors. The Board of Supervisors has enacted such an ordinance (see Chapter 16, Administrative Code, Sections 16.97-16.107).

Applicants for appointments to offices or employments in the Police Department shall be five or more years in the state; for the Fire Department five or more years in the city; for all other offices or employments, one or more years in the city (Section 16.98). There are exceptions to this requirement. (See: Sections 16.100, 16.101.)

All persons appointed to offices or employments in the city are required to continue to be residents during their incumbency in office or employment (Section 16.99) with certain exceptions. The exceptions are as follows:

1. Assignment to a position where the usual and major duties require presence at places outside the city and county (Section 16.99);

2. The Board of Supervisors may by resolution, upon recommendation of the Commission or a department head concerned, with the approval of the Mayor, and if the position is subject to civil service examination, upon approval of the Civil Service Commission, waive residence requirements (Section 16.100);

3. Any officer or employee may apply directly to the Retirement Board for authorization to live outside the city and county. The Retirement Board is granted authority to permit any such officer or employee to live outside the city if, on the basis

of medical and any other available information, the Retirement Board believes such authorization should be granted on account of ill health of such officer or employee, or the ill health of a member of the immediate family of such officer or employee (Section 16.103).

Charter History Concerning Residence Requirement.

Prior to February 5, 1958, Section 7 of the Charter provided in part as follows:

> "A 'resident' within the intent and purpose of this section, means one who actually lives within the city and county and maintains an abode therein, where such resident with his family, if any, customarily spends the night, provided, however, that residence outside the confines of the city and county for a period not to exceed three months in any calendar year, or absence of a resident from the city and county upon any bona fide journey, whether for business or pleasure and for whatever length of time, or absence of a resident while in the performance of any duties as an elected or appointed official or employee of the State of California or the government of the United States, shall not be within the contemplation of this section. Any officer or employee except elected officers of the city and county, however, may live outside the City and County of San Francisco upon authorization granted exclusively by the retirement board, if on the basis of medical and any other available information, that board believes that such authorization should be granted on account of the ill health of said officer or employee or the ill health of a member of the immediate family of said officer or employee."

Section 7 of the Charter was amended at the election held on November 5, 1957, which amendment was ratified by the State Legislature on February 5, 1958. The present section gives discretion to the Board of Supervisors to legislate respecting residential qualifications for officers and employees, other than elected officers and members of Boards and Commissions. The provision authorizing the Retirement Board to permit members of Boards and Commissions to reside outside of the city on grounds of ill health was deleted.

The amendment to Section 7 further deleted any definition of what shall constitute a "resident" within the intendment of the section. A letter from the Civil Service Commission to the Board of Supervisors dated June 21, 1957, commenting on the proposed amendment of Section 7 of the Charter, states as follows respecting this deletion:

> "The final change is the elimination of the definition of the term 'resident' in section 7. For purposes of that section a resident is defined as one who actually lives within the city and county and maintains an abode therein where such resident with his family, if any, customarily spend the night. By elimination of this definition, residence would be determined by the general and case law. . . ."

Meaning of "Resident" in
Charter Section 7.

The above statement that the word "resident" in Charter Section 7 must now be defined under the requirements of general law on the subject is correct. The precise definition of what constitutes a "resident" contained in former Section 7 is no longer applicable.

In Ballf v. Public Welfare Department, 151 C.A. 2d 784 (1957), the Court, in construing the meaning of the word "resident" contained in Charter Section 7 prior to the 1958 amendment, points out differences between the provisions of the former and present section as follows:

> "The reference to abode amplifies the requirements of residence. It undoubtedly was inserted to prevent the following situation which could well occur without it. An employee maintaining his legal residence in the city and perhaps, even being registered to vote there, nevertheless could with his family live the greater portion of the year in some nearby locality. Section 7, therefore, requires that in addition to being a resident of the city he must with his family live there at all times other than as excepted by the section." (p. 789)

The word "resident" has several meanings in law depending primarily upon the purposes which the statute wherein the term is

used seeks to accomplish. In Smith v. Smith, 45 C. 2d 235 (1955), the Court said:

> "Courts and legal writers usually distinguish 'domicile' and 'residence,' so that 'domicile' is the one location with which for legal purposes a person is considered to have the most settled and permanent connection, the place where he intends to remain and to which, whenever he is absent, he has the intention of returning, but which the law may also assign to him constructively; whereas 'residence' connotes any factual place of abode of some permanency, more than a mere temporary sojourn. 'Domicile' normally is the more comprehensive term, in that it includes both the act of residence and an intention to remain; a person may have only one domicile at a given time, but he may have more than one physical residence separate from his domicile, and at the same time. (28 C.J.S. 'Domicile,' §1, p. 1 et seq.; 16 Cal. Jur. 2d 'Domicile,' §§ 2-3, pp. 647-649.) But statutes do not always make this distinction in the employment of those words. They frequently use 'residence' and 'resident' in the legal meaning of 'domicile' and 'domiciliary,' and at other times in the meaning of factual residence or in still other shades of meaning. (Rest., Conflict of Laws, §9, com. e; 17 Am. Jur. 'Domicile,' §9 p. 593) For example, in our codes 'residence' is used as synonymous with domicile in the following statutes; sections 243 and 244 of the Government Code, giving the basic rules generally regarded as applicable to domicile (Lowe v. Ruhlman, 67 Cal. App. 2d 828, 833 [155 P. 2d 671; . . ."

It is apparent from a reading of the decisions that the word " resident" as used in Charter Section 7 means an abode in the city and county which is equivalent to a "domicile" therein, to wit - "the act of residence and an intention to remain."

As pointed out in Smith v. Smith (supra), Sections 243 and 244 of the Government Code set forth the basic rules which are generally regarded as applicable to domicile.

Government Code Section 243 provides as follows:

> "Every person has, in law, a residence."

Government Code Section 244 provides in part as follows:

"In determining the place of residence the following rules are to be observed:

"(a) It is the place where one remains when not called elsewhere for labor or other special or temporary purpose, and to which he returns in seasons of repose.

"(b) There can only be one residence.

"(c) A residence can not be lost until another is gained.

* * * * *

"(g) The residence can be changed only by the union of act and intent."

The decisions of the California Appellate Courts indicate that the terms "residence" and "domicile" are considered to be synonymous in statutory provisions relating to qualifications for public office or employment.

See: Ballf v. Public Welfare Department, 151 C.A. 2d 734 (1957);

Dierssen v. Civil Service Commission, 43 C.A. 2d 53 (1941);

Sheehan v. Scott, 145 Cal. 684 (1905)

This view is also expressed in the decisions of the Appellate Courts of other states.

State v. Williams, 261 P. 2d 131 (N. Mex. 1953);

Gallagher, et al, v. Board of Supervisors of Elections, 148 Atl. 2d 390 (Md. 1959).

See also: McQuillin, Municipal Corporations, 3rd Ed., Sec. 12.59;

Rhyne, Municipal Law, pp. 122-125;

42 Am.Jur., Sec. 45, p. 916.

City Attorney's Opinion No. 1566 of September 20, 1961, discusses the importance of voting registration as a factor in determining "residence."

The term "resident," therefore, as stated in Section 7 of the Charter and provisions of the Administrative Code above cited, contemplates that city officers and employees must have an actual dwelling or abode in the city and county. The abode and dwelling in the city and county must be the place in which they intend to remain and when absent to which they have the intention of returning and considered by them to be the one permanent abode or dwelling.

Maintenance of a Dwelling
Outside of City and County.

The most common question with respect to "residence" of a person arises from the maintenance of a dwelling both within the city where an officer or employee is required by law to reside and his having a dwelling also in some other place. The California Appellate Courts have held in questions involving "domicile" where the necessity of establishing this fact has been decided in connection with other matters, where a person has acquired two dwellings in different places and spends part of his time in each, the place of his domicile depends upon his intention as manifested by his acts and declarations on the subject.

In Chambers v. Hathaway, 187 Cal. 104, the Court said at page 105:

> "Where a person has two dwellings in different places and resides a part of his time in one place and a part of the time in another alternatively, the question which of the two places is his legal residence is almost altogether a question of his intent. 'If a party has two residences, that will be esteemed his domicile which he himself selects or deems to be his home, or which appears to be the center of his affairs, or where he votes or exercises the rights and duties of a citizen.' (9 R.C.L. 538; see, also, 19 Corpus Juris, p. 501.)"

See also: Estate of Brady, 177 Cal. 537.

In State v. Williams, (supra) where the New Mexico Constitution required municipal officers to be residents of the political subdivision for which they were elected or appointed, the Court refused to remove a Mayor from office who had city,

summer and ranch homes, holding he was a resident of the city. The Court said:

> "To interpret the sense in which such a term 'reside' is used, we should look to the object or purpose of the statute in which the term is employed. A man can have only one place of residence for voting purposes and certain other purposes, but there is no reason, why, within the meaning of the above sections of the constitution, he may not have more than one place to reside in. A man may have a city home, ranch home, summer home, as respondent in the case at bar had, and also a place of permanent abode." (p. 133)

* * * * *

> "In case of doubt as to a voter's residence, it is resolved in favor of the permanency of residence in the precinct where he casts his ballot. 29 C.J.S., Elections, §19, p. 39. 'Residence is made up of fact and intention. There must be the fact of abode and the intention of remaining.' (p. 134)

In summary, an elected officer or member of a Board or Commission must be a resident of the city and county for a period of at least five years and an elector thereof for at least one year immediately prior to the time of his taking office. An elected officer or member of a Board or Commission must continue to be a resident of the city and county during incumbency of office.

Other officers and employees must be residents of the city and county for varying periods of time depending upon the position prior to taking office or appointment (with exceptions). Ordinances presently in effect provide that such officers and employees shall continue to be residents of the city and county during incumbency of office or period of employment (with exceptions).

The term "resident" as set forth in Charter Section 7 and provisions of the Administrative Code has the same meaning and application for all officers and employees of the city and county. "Residence" no longer requires an officer and employee to maintain an abode where such person with his family customarily spends the night in the city and county for at least nine months of the year.

In 1958 this definition was deleted from Section 7 of the Charter.

To be a "resident" within the meaning of the requirement, an officer or employee must comply with the following general requirements. He must maintain an actual abode or dwelling within the city and county; the abode or dwelling must constitute his "domicile" in law, that is, he must have the continued intention of maintaining the abode or dwelling in the city and county as his one permanent home or abode; his intention must be manifested not only by his declarations, but by his acts. Where questions concerning "residence" arise, for instance, where an officer or employee maintains a second dwelling elsewhere, the circumstances and facts must be sufficient to show that (guided by certain standards which the decisions of the courts have established) the officer or employee has, in fact, not only maintained an abode or dwelling in the city and county, but that this abode or dwelling is his one permanent home or abode.

You are advised accordingly.

Respectfully submitted,

THOMAS M. O'CONNOR
City Attorney

To: Honorable John Jay Ferdon
Board of Supervisors
235 City Hall
San Francisco 2, California

RJH/TJB

OPINION NO. 62-16

March 20, 1962

SUBJECT: GRANTING OF RETIREMENT BENEFITS AFTER APPLICANT IS DISMISSED FROM SERVICE--EFFECT OF DISMISSAL SHOULD DISABILITY TERMINATE

Dear Sir:

Your request for an opinion is as follows:

REQUEST

"Harry Arthur Krohn, E202 Senior Electric Railway Shop Mechanic, Municipal Railway was appointed to a permanent position on April 18, 1952. Mr. Krohn was served with written charges on hearing for dismissal on September 7, 1961. The hearing was scheduled for September 28th. At the request of Mr. Krohn, the hearing was postponed to and held on October 5th. On November 6th Mr. Kirkwood, Manager of Utilities, notified Mr. Krohn and his attorney, Mrs. Minudri, that he was dismissed from the service. Mr. Krohn did not enter an appeal to the Civil Service Commission from his discharge, and the discharge became automatically final thirty days after the finding of the appointing officer.

"On September 26th Mr. Krohn applied to the Retirement Board for disability retirement. This request was first considered at the meeting of the Retirement Board held November 22nd, and his disability retirement was approved to be effective July 1, 1961. This disability retirement was later amended to be September 1, 1961. It may be noted that Mr. Krohn did not work since at least July 1, 1961.

"We, therefore, have the unusual situation of an employee being discharged by his appointing officer and subsequent to the date of his discharge, the Retirement Board approving his disability retirement retroactive to a date prior to the date of his discharge. This matter is of importance, since under a disability retirement, the Retirement Board could later determine that Mr. Krohn had recovered from his disability and reinstate him to his position, unless the dismissal action stands.

"Your opinion is requested as to whether (1) may the Retirement Board act on a request for a disability retirement of an applicant who has already been dismissed from his position in the city and county service, and (2) if a disability retirement can be granted to an

employee who has been dismissed, would the dismissal remain in force should the Retirement Board later determine that the retired person is physically capable of returning to his employment."

O P I N I O N

It is my opinion that the Retirement Board was acting within its authority in hearing and granting a disability pension to Harry Arthur Krohn. It is immaterial that the hearing (November 22, 1961) was held after the employee was dismissed on November 6, 1961. Under the provisions of the San Francisco Administrative Code, and the applicable case law, the Retirement Board can hear and act on requests for disability retirement after the discontinuance of city service. (San Francisco Administrative Code, Section 16.71; Ware v. Retirement Board, 65 C.A. 2d 781; Holt v. Board of Police Commissioners of the City of Long Beach, 86 C.A. 2d 714).

Your second question raises the point of Mr. Krohn being entitled to his former position of Senior Electric Railway Shop Mechanic should the reason for his disability disappear. This is an entirely different matter from his right to a disability pension.

It is my opinion that Mr. Krohn would not be entitled to be restored to his old position should the reason for his disability disappear. Mr. Krohn was notified of his dismissal on November 6, 1961. He did not file any appeal from the decision of the department head within the required thirty days. Charter Section 154 was fully complied with in this instance. The section is clear as to the employee's right to appeal the decision. The section reads, in part, ". . . The finding of the appointing officer shall be final, unless within thirty days therefrom the dismissed employee appeals to the civil service commission . . . ." (emphasis added).

It is incumbent upon the employee to process a timely appeal within the charter provision and by his failure to do so he waives his right to be restored to his former position. Where an employee fails to exhaust his administrative remedies, he has no standing in court to compel restoration to a former position. It is a basic requirement for the right of judicial review of an administrative adjudication that the employee has exhausted all administrative remedies. (Alexander v. District Court of Appeal, 17 Cal. 2d 198; State Personnel Board v. Superior Court, 175 C.A. 2d 158). The exhaustion of administrative remedies is not a matter of discretion with the courts, it is jurisdictional. (United States v. Superior Court, 19 Cal. 2d 189).

It is also clear under our law that a person's administrative remedies have not been exhausted until an administrative appeal, where provided for, is fully prosecuted. (Abelleira v. District Court of Appeal, 17 Cal. 2d 280). Charter Section 154 as set forth in part, supra, provides for just such an appeal. The employee's failure to exhaust his administrative remedies in such a situation constitutes a waiver of his right to appeal, and is in effect a consent to the administrative action taken. (Reardon v. Daly City, 71 C.A. 2d 759).

By merely dating back the disability pension awarded to Mr. Krohn to September 1, 1961, the Retirement Board could not make the action taken by Mr. Kirkwood ineffective. In this case the pension was not granted until November 22, 1961, by which time the dismissal hearing had been held. Mr. Krohn had the right to process his appeal from November 6, 1961 to December 6, 1961. It should also be noted that the original hearing on the dismissal charges was scheduled for September 28, 1961, and specifically continued to October 5th at Mr. Krohn's request. This fact, together with the failure of Mr. Krohn to process an appeal when he was notified by his department head on November 6th that he was dismissed from the service (which was before the Retirement Board acted on his request for disability retirement on November 22nd) clearly puts him in the position of one failing to exhaust his administrative remedies.

Mr. Krohn having failed to process a timely appeal within the time permitted, and therefore having failed to exhaust his administrative remedies or to seek judicial redress, the courts will not review the merits of the controversy, if the officer acted within his jurisdiction. The decision of the appointing officer becomes immune from objections in a collateral proceeding. (Stockton v. Dept. of Employment of the State of California, 25 Cal. 2d 264; Alexander v. State Personnel Board, 22 Cal. 2d 198). Here the appointing officer clearly followed the statutory procedures provided in the charter. (Charter of the City and County of San Francisco, Section 154).

It is, therefore, my opinion that Mr. Krohn would not be entitled to reinstatement to his old position even though the reason for his disability disappears.

You are advised accordingly.

Respectfully submitted,

THOMAS M. O'CONNOR
City Attorney

To: Mr. George Grubb
General Manager of Personnel
151 City Hall

MBF/NSW

OPINION NO. 62-17

March 22, 1962

SUBJECT: TAX ON TRANSIENT OCCUPANCY OF HOTEL ROOMS; EXTENSIONS OF TIME FOR PAYMENT; REFUND OF PENALTY

Gentlemen:

Your request for an opinion is as follows:

R E Q U E S T

"The Board of Review on Hotel Room Tax as established under Ordinance 87-61, held its first meeting on March 12, 1962, at which time it was decided to request your opinion on the following questions:

"1. Under Section 508 (e) The Tax Collector may extend the time for filing of a return and for payment of the tax for one month. Can the Tax Collector grant a retroactive extension?

"2. Under Section 515 - 4 (b) The Board of Review may extend the time for filing of return and for payment of the tax, for a period in excess of one month. Can the Board grant a retroactive extension?

"3. Can the Board grant a retroactive extension of time and order the penalty refunded where a taxpayer files his return and makes payment of the tax, penalty and interest and subsequently makes application for a retroactive extension of time and a refund of the penalty?"

O P I N I O N

Provisions for granting extensions of time in the so-called "Hotel Tax" ordinance are identical to those contained in the San Francisco Purchase and Use Tax Ordinance. Accordingly, City Attorney's Opinion No. 730, dated October 19, 1953, is applicable to the questions you present and a copy thereof is attached for your guidance.

Your specific questions are answered as follows:

(1) Yes. The Tax Collector may grant an extension of time for a period not exceeding one month. Application for such extension may be received either before the delinquency date or within one month following such date.

(2) Yes. The Board of Review may grant an extension of time for a period in excess of one month. Application for such extension may be received at any time so long as good cause is found to exist.

(3) Yes. In any case where an extension of time is granted, penalty having previously been paid, the taxpayer may file for a refund of such penalty pursuant to the provisions of Section 514(f) of the ordinance.

You are so advised.

Respectfully submitted,

THOMAS M. O'CONNOR
City Attorney

TO: Board of Review on Hotel Room Tax
289 City Hall
San Francisco 2, California

OIW/TJB

Opinion No. 730
October 19, 1953

SUBJECT: PURCHASE AND USE TAX; POWER OF BOARD OF REVIEW TO GRANT EXTENSIONS OF TIME FOR FILING RETURN AND PAYING TAX PURSUANT TO APPLICATION FILED AFTER DUE DATE PRESCRIBED IN ORDINANCE; WHETHER WAIVER OF PENALTY INVOLVED.

Dear Sir:

I have your request for an opinion as follows:

R E Q U E S T

"The following is quoted from the Purchase and Use Tax Ordinance: (Ord. 4537, 7-30-47)

"SECTION 60.1. BOARD OF REVIEW; APPEALS, RULES, PROCEDURE . . .

"The Board shall have power, and it shall be its duty: . . .

(4) To grant for good cause, applications for extensions of time in excess of one month, for making any return or payment of tax, and to prescribe rules therefor.

"With respect to the above, your opinion is requested regarding the following questions:

1. Does the Tax Collector or the Board of Review have authority to grant an extension of time retroactively? In other words, is the Board empowered to grant an extension if the application therefor is received AFTER the delinquency date?

2. If the Tax Collector or the Board has such authority, is there a limitation in time for its exercise? Is it proper for the Board to allow an extension retroactively after 30 days, 60 days, 90 days, 6 months, 1 year, 2 years . . .? At what point does such extension become, in effect, a waiving of penalties rather than an extension of time?"

O P I N I O N

The power of our Board of Review to grant extensions of time for filing returns and paying the tax is stated in section 60.1 of our ordinance as follows:

> "To grant for good cause, applications for extensions of time in excess of one month, for making any return or payment of tax, and to prescribe rules therefor."

In the foregoing grant of power the legislative body has not prescribed when an application for an extension of time has to be filed or the length of time for which an extension may be granted but has rather left these determinations to the discretion of the Board of Review and has specifically provided that the Board may promulgate rules therefor.

That the foregoing uncircumscribed power to grant extensions of time for good cause permits such an extension after the due date as well as before is, I believe, clear when it is considered that the effect of such an extension is to preclude the imposition of a penalty, a punishment for wrongdoing, and the good cause negating the existence of circumstances warranting a penalty may as well explain and exculpate the failure to file an application for extension prior to the due date. Thus if a businessman maintaining his own accounts sustains a serious injury which totally incapacitates him prior to the return date and by reason thereof cannot file the return on time, he unquestionably would be likewise incapacitated for the same reason from filing an application for extension prior to the return date. It would be patently unreasonable to determine that he was guilty of no wrong warranting punishment in the form of a penalty in failing to make the return, but conversely to hold that by reason of failing to file an application for an extension prior to the return date the penalty should attach.

The foregoing interpretation of §60.1 is not only reasonable but is consonant with the well established rules of statutory construction that tax statutes are liberally construed in favor of the taxpayer and that penalties are strictly construed against the government. It further accords with the Attorney General's interpretation of the extension of time provisions of the State Sales and Use Tax law, and in this connection you are reminded that the Board of Review has adopted by reference the rules and regulations of the State Board of Equalization insofar as they

can be made applicable under our type of ordinance. In opinion No. NS922 dated March 28, 1938, the Attorney General advised the State Board of Equalization that it could grant the taxpayer a thirty day extension of time prior to the due date for good cause and after the due and payable date if the taxpayer requested an extension for good cause.

You are therefore advised in answer to your first question that it is my opinion that the Board of Review may grant extensions of time retroactively for filing the return and paying the tax.

Considering the second question set forth in your request I have hereinabove noted that the legislative body has not imposed a time limitation on the Board of Review in granting extensions of time but rather has left this matter subject to board rule. Thus the length of time is left to the Board of Review's discretion, the only statutory requirement being that good cause be shown and again it is left within the power of the Board to determine what constitutes good cause in a particular case. In granting such extension the Board is subject to the rules of law applicable to public boards and commissions generally that it must act reasonably and in good faith and that it may not abuse the discretion confided in it. The foregoing being so, I believe it is obvious that I cannot give a categorical answer to the several periods of time set forth in your letter. Each application that is submitted to the Board requesting an extension of time must be considered on its own merits.

With reference to your further question inquiring as to the point at which an extension may be considered as the waiving of a penalty, please note the following excerpts from Opinion No. N.S.2448 of the Attorney General, dated March 27, 1940, considering a similar question under the State Sales Tax law:

> "Clearly section 10 confers upon the board the authority to determine the existence of 'good cause' and to grant an extension for filing returns or paying a tax for a period not exceeding thirty days.
>
> "Also section 10 clearly has the effect, in the event an extension is granted for filing a return, of setting aside or removing any 'penalty' automatically imposed for late filing, since the section provides for the payment of interest only for the period of the extension.

"If section 10 be construed as requiring the imposition of a penalty in the case of an extension of time, the section would be rendered meaningless since in that event the extension of time to the taxpayer would accomplish nothing.

"Furthermore, section 9½ imposes a penalty only when the tax is not paid within the time required by this act. As section 10 authorizes the board when good cause exists to extend the time for paying the tax and the imposition of the penalty depends on the expiration of the time for paying the tax, no penalty is due under the terms of section 9½ when such extension has been made and payment is made within the extended period. If no penalty is due and collectible the cancellation follows as a mere clerical matter and does not have the effect of relieving the taxpayer of a liability. I am of the opinion that under sections 9½ and 10 the board may cancel on its records the evidence of a penalty which no longer exists without referring the matter to the Board of Control."

I agree with the reasoning of the Attorney General and believe it can be applied with equal validity to the pertinent provisions of our own ordinance.

You are thus advised in connection with your inquiries as submitted.

Respectfully submitted,

DION R. HOLM
City Attorney

TO: Mr. Harry D. Ross
Controller, City and County
of San Francisco
City Hall
San Francisco 2

TJB

OPINION NO. 62-13

March 22, 1962

SUBJECT: PALACE OF FINE ARTS, SUBSTITUTION OF NEW BUT SMALLER FACILITY FOR MAIN BUILDING

Dear Sir:

Your request for opinion is as follows:

REQUEST

"You have given the opinion that the legal requirements of the Palace of Fine Arts Bond Issue could be met by retaining the main building.

"In your opinion, could such legal requirements also be met by substituting for the main building a new but smaller facility for the specific uses stated in the bond issue?"

Your request for opinion does not indicate what type of building the "new but smaller facility for the specific uses stated in the bond issue" would be. I am mindful that the Director of Public Works in his letter of January 15, 1962, to the Board of Supervisors, relative to the rehabilitation and conversion of the Palace of Fine Arts, set forth certain alternatives, two of which (Alternate No. I and Alternate No. IV) indicate a "new building smaller than the present main building." On page 2 of his letter, on Alternate No. I, his letter states: "Demolish Main Building and provide park with recreation facilities and small building for exhibits and community functions."

In answering your request for opinion, I am assuming that the "new but smaller facility" you have reference to is the type of building referred to in the letter of the Director of Public Works of January 15, 1962, and proposed under Alternates I and IV.

OPINION

As I pointed out in my prior opinion, to which you referred in your request (Opinion No. 62-5, dated February 5, 1962), the passage of a bond issue by the electorate of the City and County of San Francisco creates a contractual relation between the electors and the supervisors of the City and County of San Francisco. The terms of the contract are contained in the ordinance calling the election and the ballot proposal approved by the electors.

See: Peery v. City of Los Angeles, 187 Cal. 753;

O'Farrell v. County of Sonoma, 189 Cal. 343, 348;

County of Alameda v. Garrison,
108 Cal. App. 122, 126;

County of San Diego v. Perrigo,
155 Cal. App. 2d 644.

The legislative body in the order of submission of a bond issue may make it definite and specific as to the various items (see O'Farrell v. County of Sonoma, supra; Hunter v. County of Santa Barbara, 110 Cal. App. 698), or may make it broad and general, leaving the details of the proposed construction to the good faith and judgment of responsible public officials (see Sacramento M. U. Dist. v. All Parties, etc., 6 Cal. 2d 197; Williams v. City of Stockton, 195 Cal. 743). My predecessor in an opinion relative to the Hall of Justice Bond Fund, dated June 24, 1959 (Opinion No. 1367), stated:

> "A legislative body may make its order of submission of a bond issue in definite and specific terms as to the various items of construction. When so submitted, these elements become a part of the contract created between the public body and the electorate when the bond issue is ratified which cannot be altered at the will of one of the parties. (O'Farrell v. County of Sonoma, 189 Cal. 343.) However, it is also competent for a legislative body to make its order in broad and general terms, leaving the details of the proposed construction to the good faith and judgment of the responsible public officials. The general principle is stated in the case of Sacramento M. U. Dist. v. All Parties, etc., 6 Cal. 2d 197, 202:
>
> "'The rule is that public bodies may submit bond propositions in broad and general terms. Such a body may make its order of submission "just as broad, and just as narrow", or just as specific as it is willing to be bound by. (O'Farrell v. Sonoma County, 189 Cal. 343, 347 [208 Pac. 117].) When the authorities having the power and responsibility of proposing the bond issue have not, by the forms employed in submitting the proposition to the electors, confined themselves to an absolutely definite and inflexible plan of construction and expenditure, and have proceeded, free from fraud and in good faith, in accordance with the program based upon estimated costs, no good reason appears why they should not be permitted to carry on the improvement to the extent of the funds available. (Williams v. City of Stockton, 195 Cal. 743, 756 [235 Pac. 986].)'"

It now becomes necessary to examine Ordinance No. 426-59 providing for the submission to the electors of a proposition to

incur a bonded indebtedness for the Palace of Fine Arts in the light of the general principles of law set forth above. Said ordinance provides in part as follows:

"(c) PALACE OF FINE ARTS, 1959.

"$1,000,000 to pay the cost of additions, betterments, improvements and reconstruction of the Palace of Fine Arts within the City and County of San Francisco, to provide within the structure for a small theatre, music hall, an area for work and exhibit space for visual, graphic and plastic arts, convention activities, youth activities and recreational activities, studio, office space, and all furnishings, equipment, works, properties and structures necessary or convenient for the additions, betterments, improvements and reconstruction of the Palace of Fine Arts."

The argument submitted to the voters in the ballot pamphlet refers to the gift of $2,000,000 from Walter S. Johnson "to restore the Palace of Fine Arts building"; states that "the Palace will be reconstructed of permanent materials and continue as one of the nation's outstanding landmarks"; refers to "the restored Palace"; and further states that "We are now losing these important meetings to other cities for the lack of the type of space the Palace would provide." (Emphasis added)

Ordinance No. 426-59, quoted above, provided for:

(a) Additions, betterments, improvements and reconstruction of the structure known as the Palace of Fine Arts, which structure comprises not only

(1) the rotunda,
(2) the colonnades, but also
(3) the main building, which was at the time of its construction, and now is, an integral part of the Palace of Fine Arts; and

(b) Within the structure described in (a) above, a theatre, music hall, an area for work and exhibit space for arts, convention facilities, youth activities, recreational activities, and other specified uses.

It becomes necessary to determine (a) whether the real purpose of Ordinance No. 426-59 was the reconstruction of the structure known as the Palace of Fine Arts, composed of (1) the rotunda, (2) the colonnades, and (3) the main building, substantially in the form as it existed in 1915 and at the time the election was called, said reconstructed structure thereafter to be used for the purposes set forth above, or (b) whether the real purpose was the construction of a structure for the purposes set forth above, the type and design of the structure to be left to the good faith and judgment of the responsible public officials.

A somewhat similar question was presented to the court in the case of City of San Diego v. Millan, 127 Cal. App. 522, where the ordinance called for an election on the issuance of bonds for "developing, impounding, conserving, storing and distributing" the waters of a certain river for the use of inhabitants of the city by means of certain improvements including a dam of a specific type described in detail in the ordinance. A change in the type of dam was made necessary by a law passed by the Legislature after the bonds were issued. The court concluded that the change in the type of dam as required by State law could not be considered a departure from the purposes for which the bonds had been authorized so as to prohibit the use of the bond money for such changed type of dam. The court concluded that the real purpose was the "developing, impounding, conserving, storing and distributing" of the waters, and its general purpose was to be accomplished by means of certain improvements, one of which was the dam in question. The court stated, at page 536:

> "Under the circumstances of this case, where in the lawful exercise of its police power the state of California compelled the City of San Diego to change the type of dam which it proposed to build with money secured from the sale of its bonds, the dam not being the sole purpose to be attained by the bond issue, but one of a number of means whereby its general purpose was to be obtained and where the change in the type of dam to be constructed placed no greater burden upon the taxpayers of the City of San Diego than that originally contemplated at the time of the election, no such breach of the contractual relation between the city and the taxpayers occurred as would justify our holding that the type of dam approved by the state officers could not be constructed and paid for with the money derived from the sale of the bonds."

In the instant case it is my conclusion that the real purpose of Ordinance No. 426-59 was the reconstruction of the structure known as the Palace of Fine Arts. As far as the exterior rehabilitation of the structure known as the Palace of Fine Arts is concerned (as distinguished from the interior conversion for the specified uses), the Board of Supervisors is committed to an absolutely definite and inflexible plan of construction, such plan being substantially the restoration of the entire structure as it was originally constructed and as it existed at the time the bond issue was approved by the electorate. To change the type of building from that which had existed when the Palace of Fine Arts was originally constructed and existed at the time the electorate approved the bonds, and to substitute therefor a building such as contemplated by Alternate No. I and Alternate No. IV as set forth above, would be an unauthorized departure from the purpose for which the bonds were authorized.

You are therefore advised that under the provisions of Ordinance No. 426-59 "a new but smaller facility for the specific uses stated in the bond issue," such as set forth in Alternate No. I and Alternate No. IV, cannot be substituted for the main building.

Respectfully submitted,

THOMAS M. O'CONNOR
City Attorney

To: Hon. Roger Boas
Member of the Board of Supervisors
235 City Hall
San Francisco 2

LSM/TJB

OPINION NO. 62-19

March 27, 1962

SUBJECT: MEMBER OF THE BOARD OF SUPERVISORS MAY BE A CANDIDATE FOR ELECTION TO AND SERVE AS A MEMBER OF A COUNTY CENTRAL COMMITTEE

Dear Sir:

Your request for opinion is as follows:

REQUEST

"May a member of the Board of Supervisors of the City and County of San Francisco be a candidate for election to, or serve as a member of, the Democratic County Central Committee, without creating a legally objectionable conflict of interest or being confronted with any other legal obstacles to such dual service?"

OPINION

Preliminary to a review of the legal questions raised by your request, it is necessary to determine the purpose of the county central committee and the status of a member of such a committee.

The Supreme Court stated in Independent Progressive Party v. County Clerks, 31 Cal. 2d 549, at 552:

> "County central committees are integral parts of the party machinery and the function of that party. It is said: 'The county central committee shall have charge of the party campaign under general direction of the State central committee or of the executive committee selected by the State central committee' (Elec. Code, § 2831) [now § 8441], and 'County central committees shall perform such other duties and services for their respective political parties as seem to be for the benefit of each party' (Elec. Code, § 2832) [now § 8442]. Other specific functions of such committees appear throughout the Elections Code all pointing to an orderly, democratic and comprehensive system for the functioning of parties and hence the exercise of suffrage through such means."

While a member of a county central committee is an "officer" he is not a county officer (Elections Code, Section 35(f) and does not hold a county office (Elections Code, Section 36).

In the case of Stout v. Democratic County Central Committee, 40 Cal. 2d 91, at 94, the Supreme Court stated:

"Generally, quo warranto is appropriate only where there is involved a public office in the sense that the incumbent exercises some of the sovereign powers of the government (Coulter v. Pool, 187 Cal. 181 [201 P. 120]; People ex rel. Chapman v. Rapsey, 16 Cal. 2d 636 [107 P. 2d 388]; Leymel v. Johnson, 105 Cal. App. 694 [288 P. 858]), and it has been held that a party committeeman is not such an officer because he performs duties and exercises powers for a particular political party rather than the sovereign power of the public (Tuck v. Cotton, 175 Ark. 409 [299 S.W. 613]; People v. Brady, 302 Ill. 576 [135 N.E. 87]; Attorney General v. Drohan, 169 Mass. 534 [48 N.E. 279, 61 Am.St.Rep. 301]; contra Dastugue v. Cohen, 14 La. App. 475 [131 So. 746]; Morris v. Peters, 203 Ga. 350 [46 S.E.2d 729]). We recognize, of course, that such committeemen perform important duties as a means through which the right of suffrage is exercised (Independent Progressive Party v. County Clerks, 31 Cal. 2d 549 [191 P. 2d 6]) and primaries are a part of the election process (In re McGee, 36 Cal. 2d 592, 596 [226 P.2d 1]).

"In the instant case we have only one claimant to each of the 'offices' (the additional committee memberships created) and it is doubtful that they are public officers for the purpose of quo warranto." (Emphasis added)

See, also, 18 Am. Jur., Elections, Section 139, which states as follows:

"Committeemen as Public Officers.-- It is generally agreed that party committeemen do not become public officers by reason of the fact that they are elected at a statutory primary election, because the duties of a public office are in their nature public; that is, they involve in their performance the exercise of some portion of the sovereign power, whether great or small, in the performance of which all citizens, irrespective of party, are interested, either as members of the entire body politic or of some duly established division of it. Manifestly, membership in a political committee belonging to one party or another does not come within the above description of what constitutes public office, and the fact that the legislature undertakes by statute to regulate the election and conduct of political committees does not make the office a public one. The members thereof continue to be, as before, officers of

the party which elects them, and their duties are confined to matters pertaining to the party to which they belong and which alone is interested in their proper performance."

From the above, I can only conclude, as did my predecessor (Opinion No. 174, dated May 4, 1950), that a county central committeeman does not hold a public office.

Section 142 of the Charter provides in part as follows:

"Any person holding a salaried office under the city and county, whether by election or appointment, who shall, during his term of office, hold or retain any other salaried office under the government of the United States, or of this state, or who shall hold any other salaried office connected with the government of the city and county, or who shall become a member of the legislature, shall be deemed to have thereby vacated the office held by him under the city and county."

This section would not affect the right of a member of the Board of Supervisors to become a candidate for election to, or to serve as a member of, a county central committee, inasmuch as the section by its very terms prohibits the holding or retention of a salaried office of the State or any other salaried office connected with the government of the city and county. A county central committeeman is neither salaried nor an officer of the State or of the government of the city and county.

I have considered the question of whether the right of a member of the Board of Supervisors to become a member of a county central committee would be restricted by the provisions of Section 222 of the Charter, which reads in part as follows:

"No supervisor and no officer or employee of the city and county shall engage in any activity, employment or business or professional work or enterprise which is inconsistent, incompatible, or in conflict with his duties as a supervisor or officer or employee of the city and county or with the duties, functions and responsibilities of his appointing power, or the department, office or agency by which he is employed, or the board or commission of which he is a member."

As pointed out above, the county central committee is an integral part of the machinery of and a function of a political party, and has charge of the party campaign under the general direction of the state central committee or of the executive committee selected by the state central committee (Elections Code, Section 3440), and performs such

other duties and services for the political party as seem to be for the benefit of the party (Elections Code, Section 8442). Such activity would in no way conflict with the duties of a member of the Board of Supervisors, and I therefore conclude that membership on a county central committee would not be "inconsistent, incompatible, or in conflict" with the duties of a supervisor.

You are therefore advised that a member of the Board of Supervisors of the City and County of San Francisco may be a candidate for election to or serve as a member of a county central committee.

Respectfully submitted,

THOMAS M. O'CONNOR
City Attorney

To: Hon. Jack Morrison
Member of the Board of Supervisors
235 City Hall
San Francisco 2

LSM/TJB

OPINION NO. 62-20

April 4, 1962

SUBJECT: EVICTION OF PRODUCE MERCHANTS FROM EMBARCADERO-LOWER MARKET APPROVED REDEVELOPMENT PROJECT AREA E-1 - BOARD OF SUPERVISORS RESOLUTION NO. 907-58, EFFECT OF.

Dear Sir:

Your request for Opinion dated April 3, 1962, is as follows:

R E Q U E S T

"Enclosed is a copy of Resolution No. 907-58, adopted by the Board of Supervisors on October 14, 1958. It is entitled 'Establishing policy in connection with relocation of wholesale produce industry from Embarcadero-Lower Market Redevelopment Project Area E-1 and Assessor's Blocks 202 and 203 of the City and County of San Francisco.'

"The resolution reads in part: 'Resolved, By the Board of Supervisors of the City and County of San Francisco that it is the sense and intention of the Board that individual members of the wholesale produce industry as now conducted in this city within the Embarcadero-Lower Market Redevelopment Project Area E-1 and Assessor's Blocks 202 and 203 of the City and County of San Francisco, shall not be required to move from premises now occupied by them because of the acquisition of their premises for any basic public improvement or redevelopment of a portion of said market area, unless and until there shall have been acquired properties in which a substantial majority of the wholesale produce industry is conducted.'

"The Redevelopment Agency is reported as having instituted process to evict immediately certain members of the wholesale produce industry in said area. Pursuant to the direction of Supervisor James Leo Halley, you are respectfully requested to favor the Board with your opinion as to whether or not such Agency's action is violative of the Board's policy as enunciated in the text quoted hereinabove."

O P I N I O N

Resolution No. 907-58, adopted by the Board of Supervisors on October 14, 1958, and approved by the Mayor on October 15, 1958, quoted in part in your letter provides as follows:

> "WHEREAS, It is recognized by the Board of Supervisors of the City and County of San Francisco that the wholesale produce industry is concentrated in the Embarcadero-Lower Market Redevelopment Project Area E-1 and in Assessor's Blocks 202 and 203 of the City and County of San Francisco, and that unnecessary hardship would be caused individual members of said industry if any of the members are required to move from the project area and said blocks before substantially all of the industry is required to move; and
>
> "WHEREAS, The Board of Supervisors of the City and County of San Francisco recognizes the importance not only to the wholesale produce industry but to the community as a whole of a united move of said produce industry to a new location; and
>
> "WHEREAS, The accomplishment of such unified move will require the full cooperation of the owners and tenants of the properties occupied by the wholesale produce industry with the Redevelopment Agency of the City and County of San Francisco and this Board of Supervisors, where necessary in its program of public improvement and redevelopment of the project; now, therefore, be it
>
> "RESOLVED, By the Board of Supervisors of the City and County of San Francisco that it is the sense and intention of the Board that individual members of the wholesale produce industry as now conducted in this city within the Embarcadero-Lower Market Redevelopment Project Area E-1 and Assessor's Blocks 202 and 203 of the City and County of San Francisco, shall not be required to move from premises now occupied by them because of the acquisition of their premises for any basic public improvement or redevelopment of a portion of said market area, unless and until there shall have been acquired properties in which a substantial majority of the wholesale produce industry is conducted. Properties acquired shall be leased on a month to month basis to occupants in said produce industry at prevailing rentals."

It should be noted that blocks 202 and 203 referred to in the above resolution were deleted from the redevelopment area by Resolution No. 408-59 adopted by the Board of Supervisors on May 18, 1959, and approved by the Mayor on May 21, 1959. Moreover, blocks 202 and 203 were not included in the project area of the Redevelopment Plan passed May 25, 1959, by the Board of Supervisors as Ordinance No. 301-59 and approved by the Mayor on May 27, 1959.

While block 202 was subsequently included in the redevelopment area by Resolution No. 74-62 adopted by the Board of Supervisors on February 9, 1962, and approved by the Mayor on February 9, 1962, the Redevelopment Plan has not yet been amended to embrace such block, and it is not presently included in the project area of the plan.

The text attached to, and made a part of the Redevelopment Plan, Ordinance No. 301-59 above referred to, contains the following statement in Sec. 301, page 4:

> "Until acquisition of property in which a substantial majority of the wholesale produce industry is conducted, the Agency will lease properties acquired by it on a month-to-month basis to occupants in said produce industry at prevailing rentals; . . . ."

It is my understanding that the produce industry conducted within the project area described in the plan is found entirely in blocks 172, 198, 199, 200, 201, 204, 205, 230, and 231.

The Redevelopment Agency is charged with the responsibility for carrying out the plan in accordance with its terms. Sec. 33743 of the Health and Safety Code provides as follows:

> "Upon the filing of the ordinance with the clerk or other appropriate officer of the legislative body, a copy of the ordinance shall be sent to the agency, and the agency is vested with the responsibility for carrying out the plan."

See also text of Redevelopment Plan, Ordinance No. 301-59, Sec. 401, page 4.

Any change in plan requires an amendment to the plan in accordance with the provisions of Section 33747 of the Health and Safety Code.

Thus, under the Redevelopment Plan it appears that the Agency is required to lease properties acquired by it on a monthly basis to occupants engaged in the produce industry at prevailing rentals until acquisition has been completed of property in which a substantial majority of the wholesale produce industry is conducted.

It is the position of the Redevelopment Agency that the requirement imposed by the plan has been fully met. The records of the Redevelopment Agency reflect that the Agency has either acquired all property used in the produce business in the project area or has received offers of sale from the owners thereof which are presently being concluded by the recordation of deeds.

If the Agency has thus acquired all properties within the project area used in the produce business either by deed or formal offer, the deeds to which will be presently recorded, the requirement of the Redevelopment Plan has been complied with and under the Redevelopment Plan, Cooperation Agreement or Community Redevelopment Law, the Board of Supervisors would have no authority to delay the eviction of such produce merchants from the Redevelopment Project Area.

Under Sec. 33743 of the Health and Safety Code the Agency is vested with the responsibility for carrying out the plan which includes the acquisition and sale of property to redevelopers who are required to develop the property in accordance with the plan.

You are advised accordingly.

Respectfully submitted,

THOMAS M. O'CONNOR
City Attorney

TO: Mr. Robert J. Dolan
Clerk of the Board
235 City Hall
San Francisco 2, California

RJH/TJB

OPINION NO. 62-21

April 9, 1962

SUBJECT: GRANTOR-GRANTEE INDEXES, RECORDER'S OFFICE, CONVERSION TO IBM

Dear Sir:

Your request for opinion is as follows:

R E Q U E S T

"The Recorder's Office is contemplating changing from a manually prepared Grantor-Grantee index to one prepared on IBM machines.

"Government Code Section 27257 controls the general format of these indexes as to columnar arrangement, etc. However, the Tabulating Division of the Purchasing Department indicated a method where a substantial saving could be made. Their plan would eliminate the cross-reference to the grantee's name on the Grantors' index and vice versa on the Grantees' index. Instead, a document number would be used for reference.

"In your opinion, would this proposed procedure be legal and in conformity with Section 27257 of the Government Code?"

You nave advised me that of the several indices for which Government Code §§27232 to 27254 provide, you keep only those for powers of attorney (§27238), official bonds (§27246), transcripts of judgments (§27248), attachments (§27249), separate property of married women (§27251) and marriage certificates (§27252).

O P I N I O N

It is my opinion that this proposed procedure is not authorized by Government Code §27257. There should be a clarification of the Legislature's intent before such a procedure can be put into effect.

As amended in 1961, Government Code §27257 reads:

> "§27257. General index; requisites.
>
> "Instead of these indices the recorder may keep two indices, labeled respectively: 'General index of grantors' and 'General index of grantees.' Each page of the general index of grantors shall be divided into seven columns, labeled respectively: 'Date filed,' 'Grantors and defendants,' 'Grantees and plaintiffs,' 'Title,' 'Document Number,' 'Book,' and 'Page'. Each page of the general index of grantees shall be divided into seven columns, labeled respectively: 'Date filed,' 'Grantees and plaintiffs,' 'Grantors and defendants,' 'Title,' 'Document Number,' 'Book,' and 'Page'. In those counties where the recorder alphabetizes grantors' and grantees' names, by mechanical methods, fewer columnar headings may be used in the two indices, if adequate index reference to the location of each document in the permanent file, book, or film record is provided.
>
> "The alphabetical subdivisions in each of the general indices shall be so arranged, as nearly as possible that the entries to be made in the indices will be equally apportioned. The alphabetical subdivisions shall be sufficient in number to facilitate quick reference."

Prior to 1961, the section read:

> "§27257. General index; requisites.
>
> "Instead of these indices the recorder may keep two indices, labeled respectively: 'General index of grantors' and 'General index of grantees.' Each page of the general index of grantors shall be divided into seven columns, labeled respectively:

'Date filed,' 'Grantors and defendants,' 'Grantees and plaintiffs,' 'Title,' 'Volume,' 'Book,' and 'Page.' Each page of the general index of grantees shall be divided into seven columns, labeled respectively: 'Date filed,' 'Grantees and plaintiffs,' 'Grantors and defendants,' 'Title,' 'Volume,' 'Book,' and 'Page.' The alphabetical subdivisions and each of the general indices shall be not less than 240 in number, and so arranged, as nearly as possible, that the entries to be made in the indices will be equally apportioned under the several alphabetical subdivisions."

The question presented by your request is:

By the underlined portion of the amended section 27257, did the Legislature intend to authorize the elimination from the pages of the general grantors' index of the column labeled "Grantees and plaintiffs," and the elimination from the pages of the general grantees' index of the column labeled "Grantors and defendants," provided the index sets forth the "date filed," a "document number," a "book" and "page" number, and a document "title" which provide adequate reference to the location of each document in the permanent file, book or film record?

The answer to this question depends on whether it can be concluded that Government Code §27260, 27261, and 27262 have been repealed by implication.

The two general indices for which provision is made in Government Code §27257 are permitted substitutes for the indices which Government Code §§27232 to 27255 state "the recorder shall keep," among which are the indices of deeds (§§27232, 27233), mortgages (§§27234, 27235), releases of mortgages (§§27236, 27237), leases (§§27239, 27240), assignments of mortgages and leases (§§27243, 27244), notices of mechanics liens (§27247), and lis pendens (§27250).

Instead of these indices the recorder may keep the two general indices. (Gov. Code §27257.)

Government Code §27261 states:

"If the recorder keeps the general index of grantors and the general index of grantees <u>and indexes therein all of the names which would otherwise have been indexed in the other indices provided in this article</u>, he is not required to keep such other indices."

Thus the permission given to the recorder to keep the general indices in lieu of the other indices is conditioned on his indexing in the general indices "all of the names which would otherwise have been indexed in the other indices."

These other indices (Gov. Code §§27232 to 27254) are generally required to have columns for two sets of names, indicating that two sets of names are required to be indexed.

Government Code §27262 reads:

> "The recorder may keep the general index of grantors and the general index of grantees and also any one or more of the other indices. If he keeps any other index, he shall index therein all of the names which it is proper to index therein, and is not required to index such names in the general index of grantors or the general index of grantees."

The implication from Government Code §27262 is that, if the recorder does not keep the other indices, he is required to index in the general indices "all of the names which it is proper to index" in the other indices.

Government Code §27260 states:

> "The indexing in the general index of grantors and the general index of grantees may be in lieu of indexing in any of the other indices, and imparts notice in like manner and effect as the indexing would impart in any of the other indices."

Indexing in the general indices would not impart notice in like manner and effect as indexing in the other indices if information which would be contained in the other indices (if they were kept) is omitted from the general indices.

The Legislature may, of course, determine what notice indices shall impart and may require a title searcher to make further inquiry than an examination of the indices. The underlined portion of the amended section 27257 indicates a possible intent to require further inquiry than an examination of the indices if use of fewer columnar headings eliminates information which the indices would otherwise impart. The reference to

"adequate index reference to the location of each document in the permanent file" indicates that, in order to obtain information which the recorder is authorized to omit from the indices, the title searcher should go to the recorded document itself. However, the amended section does not state what information, if any, the recorder, by use of "fewer columnar headings," is authorized to omit.

The statute (St. 1961, p. 1130) which amends Government Code §27257 contains no provision expressly repealing Government Code §§27260, 27261, 27262. It contains no repealing clause. Repeals by implication are not favored and courts will not ordinarily indulge the presumption that the Legislature intended by a later act to repeal a former one. (County of Inyo v. Hess, 53 Cal. App. 415, 422.) To effect a repeal by implication it must appear that there is no possibility of concurrent operation of the earlier and later statutes; the repugnancy must be clear and the conflict irreconcilable to warrant a court in holding that the later statute by implication repeals the earlier. (45 Cal Jur. 2d 595-596.)

Granting that permission for "fewer columnar headings" implies permission to omit some information from the general indices which would otherwise be contained therein, the omissions of the "document number" could as well be authorized as could the omission of names. Omission of the document number would not create a conflict with §§27260, 26261 or 27262. Omission of names would. Since the presumption is against a repeal by implication, the amended §27257 should be construed as authorizing omission of the columns headed "document number" rather than a column for names. Further, it is possible that the Legislature, by amending §27257, merely intended to authorize the use of a document number in place of book and page numbers if use of a document number provides adequate index reference to the location of each document in the permanent file. Such a substitution would result in fewer columnar headings without the omission of names.

The elimination from the general grantors' index of the names of grantees and from the general grantees' index of the names of grantors, would be a substantial innovation. I feel that, before such elimination is effected, there should be a clear expression by the Legislature of its intent to authorize it.

My conclusion is that Government Code §§27260, 27261 and 27262 have not been repealed by implication and that, if the "other indices" for which provision is made in Government Code §§27232 to 27254 are not kept, existing legislation does not authorize the recorder to substitute, in the general grantors' index, document numbers for the names of grantees and plaintiffs, or to substitute, in the general grantees' index, document numbers for the names of grantors and defendants.

Respectfully submitted,

THOMAS M. O'CONNOR
City Attorney

TO: Mr. Virgil L. Elliott
Director
Department of Finance and Records
170 City Hall
San Francisco 2, California

REA/GEB

OPINION NO. 62-22

April 10, 1962

SUBJECT: EMPLOYEE ON MILITARY LEAVE, RIGHT TO RETURN TO POLICE DEPARTMENT (Nicholas S. Munson)

Dear Sir:

You have inquired of me relative to a request of Lt. Col. Nicholas S. Munson, U.S.Army Reserve, wherein he desires to be reinstated and reemployed in his civil service status as a Q2 policeman. The facts as presented by your request and the documents attached thereto and the changes in the law relative to returning veterans are all set forth in the opinion.

O P I N I O N

Lt. Col. Nicholas S. Munson, U.S.Army Reserve (hereinafter called Munson), at the time of his induction into the armed forces of the U.S.Army was a probationary appointee to a permanent position as a Q2 policeman. Munson was certified and appointed to his position as Q2 policeman on July 1, 1941. Subsequently, he was drafted into the armed forces and was granted military leave from the City service on September 24, 1941, pursuant to the provisions of Section 153 of the Charter.

Pursuant to the Rules of the Civil Service Commission, Munson's probationary period was deemed completed one year after his appointment (July 1, 1942) and while he was on military leave and consequently he was a permanent appointee on military leave thereafter. (Rule 31.1, Rules of Civil Service Commission, as amended December 17, 1941.)

In April, 1942, Munson's status was changed from that of an enlisted man in the Army Reserve to a commissioned officer. He has been under orders with the Army as an officer up to and including October 1, 1961 when he went on terminal leave prior to resigning from the Army. A summary of Munson's military service shows that after he was commissioned in 1942, he was ordered to the Far East and at the end of the war in 1945 he was on duty in China. In the early part of 1946 he returned to the United States, where he could have been released from active duty, but elected to remain in the service of the Army. For the next few years Munson served in New Jersey and Alaska. In 1949 he was assigned to Sacramento where he served until 1952. In 1952 he was again ordered overseas to Korea returning to the United States in 1955 and being ordered to the Decatur Signal Depot in Decatur, Illinois. He completed his service with the Army in 1961 at this last station. During each of the changes of duty, Munson

was required to affirmatively elect to remain in the service of the Army or he would have been separated and been eligible forthwith to apply for reinstatement in the Police Department. Now that he has been finally separated he is requesting the Civil Service Commission to terminate his military leave and reinstate him as a Q2 policeman in the Police Department. You have asked me to advise you concerning your legal authority to approve his request.

The answer to the question presented by your request depends primarily upon an analysis of the effect that various changes in the State Military and Veterans Code have on Munson's right to reenter the service of the City and County of San Francisco.

In order to better understand the application of the state law to the present situation certain preliminary matters should be discussed.

Munson was entitled to a military leave of absence from the City service at the time he was inducted in 1941. The pertinent portion of Section 153 of the Charter at the time of Munson's induction reads as follows:

> "Leaves of absence shall be granted to officers, employees and persons on eligible lists for terms of service in the army, the navy or the marine corps, in time of war and for such time thereafter as may be provided by rule of the commission, but not to exceed two years after the proclamation of peace except in case of disability incurred in line of duty, when such disability shall extend beyond such period."

The military leave included the right to return and reenter the City service under certain conditions. Additional portions of Section 153 of the Charter which dealt with the right to be reemployed read in 1941 as follows:

> "If a person on such leave has been appointed to a permanent position, he shall be entitled to resume such position at the expiration of his leave, and if any civil service rights accrue to any appointee by reason of seniority, the term of service shall be reckoned a part of his service under the City and County, exclusive of service under the retirement provisions of this Charter."

Unless there has been some change in the law which could be interpreted as legally depriving him of this right, it appears that he is entitled to return to his employment with the City as a Q2 policeman.

In 1944 the people of the State of California added Section 3.5 to Article 20 of the State Constitution. This new constitutional provision gave broad power to the Legislature to pass legislation which would deal with the right of public officers and employees to be reinstated in their public employment if they had resigned from their office or employment to serve or to continue to serve in the armed forces of the United States. Section 3.5 of Article 20 specifically stated that it covered employees of a city and county.

Following the adoption of Section 3.5 of Article 20, Section 395.1 of the Military and Veterans Code was enacted by the Legislature. This section set forth the conditions that must be met by the returning veteran on military leave who seeks reinstatement to his office or position. Section 395.1 was subsequently amended in 1947, 1949 and 1950. Each of the above amendments broadened and reaffirmed the rights of the veteran to be reinstated to his position with the political subdivision in which he had been employed at the time of his induction or enlistment. However, in 1955 the Legislature enacted an amendment to Section 395.1 which in effect curtailed the rights of certain returning veterans to be reemployed by a political subdivision. This amendment reads:

> "§395.1 . . .
>
> (a) . . . .; provided, that such right to return to and re-enter upon the office or position shall not extend to or be granted to such public officer, deputy, assistant, or employee of the State, or of any city, county, city and county, school district, water district, irrigation district or any other district, political corporation, political subdivision or governmental agency thereof, who voluntarily requests an extension of his original term of enlistment, service, or tour of duty with the armed forces of the United States or of the militia of this State."

At about the same time that the Military and Veterans Code was amended, court litigation arose in the City of Oakland relative to the right of that city to apply the provisions of

Section 395.1 of the Military and Veterans Code to its civil service employees who were veterans returning from military leave. (See Cunningham v. Hart, 80 C.A. 2d 903.) The Court stated at page 907 and 908 the following:

> "It cannot be disputed that the matters contained in section 395.1 of the Military and Veterans Code are of general concern and state-wide interest, even of national concern . . .
>
> * * * * *
>
> "Thus, the people of the state have declared this to be a matter of state-wide concern by an amendment to the Constitution, and in so doing, have granted the Legislature the power to enact general laws controlling the subject 'Notwithstanding any other provisions of this Constitution.' (Emphasis added.) This alone would appear to compel a holding that section 395.1 prevails over the 'home rule' afforded in municipal affairs by section 6, article XI."

Thus the courts have decreed that the reemployment of a returning veteran is a matter of state-wide concern, and that the provisions of section 395.1 Military and Veterans Code apply to all public employees.

Consequently the principal question upon which you are seeking my advice is the effect, if any, of the 1955 amendment to Section 395.1 Military and Veterans Code upon Munson's right to be reemployed in the City Service.

The language of the amendment indicates a legislative intent to preserve the rights of those persons who were on military leave for sometime prior to its enactment and who have voluntarily extended their original tour prior to May 15, 1955, the effective date of the amendment. It manifested this intent by using the following language: "who voluntarily requests an extension of his original term of enlistment, service, or tour of duty . . ." (Emphasis added.)

The record shows that Munson on a number of occasions prior to 1955, had voluntarily extended his tour of duty. The voluntary extension of his tour of duty which occurred in 1957 and which ended in 1961 was not an extension of an original tour since his original tour had ended many years previously.

Therefore, I advise you that since Munson is not prohibited from being reemployed by the present provisions of Section 395.1 he may be reinstated as a Q2 policeman at this time.

Opinions No. 1423 and 1436 of my predecessor are not inconsistent with this opinion. The employee involved in the earlier opinions was voluntarily extending an original enlistment and hence was subject to the provisions of Section 395.1 of the Military and Veterans Code.

You are advised accordingly.

Respectfully submitted,

THOMAS M. O'CONNOR
City Attorney

To: Mr. George J. Grubb
General Manager of Personnel
Civil Service Commission
151 City Hall, San Francisco 2

BJW/RJR

OPINION NO. 62-23

April 20, 1962

SUBJECT: MODIFICATION OF COLLECTIVE BARGAINING AGREEMENT AS BINDING UPON CIVIL SERVICE COMMISSION, HEALTH AND WELFARE BENEFITS

Dear Sir:

Your request for an opinion is as follows:

REQUEST

"As a result of the decision in Fred Martin et al vs. City and County of San Francisco, the city and county of San Francisco is required to pay health and welfare benefits to employees in the classification of M-54, Automotive Machinist and related classes in accordance with contract provisions which were in force between the years 1953 and the present time. Payment for the fiscal years beginning February 7, 1953 and June 30, 1958, has already been made. The Salary Ordinance is in process of being amended for fiscal year 1958-59 to provide for health and welfare benefits during that year.

"The contract which was recognized for this classification beginning July 1, 1959, existed between the Western Greyhound Lines and the Automotive Machinist Union. That contract did not include health and welfare benefits per se, but the benefits were recognized in a letter addressed to the Automotive Machinist Union by F. W. Ackerman, President of Western Greyhound Lines, dated July 13, 1959. A copy of this letter is attached.

"We have now been requested by the Automotive Machinist Union to seek your opinion as to whether or not the attached letter can be considered a part of a negotiable contract as far as health and welfare benefits are concerned. The benefits related to herein will be recognized for the full duration of the existing contract, namely, three years beginning June 1, 1959 and ending May 31, 1962.

"For your further information, we have been advised by Mr. B. M. Ahrens of the Pacific Greyhound Lines that the company has been paying $12.94 a month for each employee, into the joint welfare trust fund of the union for employees of the Greyhound Corporation since July 1, 1959."

O P I N I O N

The basis upon which the court in Martin v. City and County of San Francisco, 168 Cal. App. 2d 570, ruled that the City and County must pay, in addition to the actual compensation set forth in the collective bargaining agreement, a sum which would be the equivalent of the sums paid by private employers as health and welfare payments was that these sums were a part of the basic rate of pay and were set forth in the agreement. The court in its opinion stated at page 577 the following:

"'In another and later case, Adams v. City & County of San Francisco, 94 Cal. App. 2d 586 [211 P. 2d 368, 212 P. 2d 727], this section of the charter was again considered and again it was interpreted to mean that the "rate of pay" was synonymous with "take home pay." This latter phrase, of course, does not mean the amount of money such employees get home with on payday. There may be deductions for income tax, social security, retirement, attachments and executions against their salaries which would affect the actual amount of money they, respectively, received to take home. It does mean the amount the employees are entitled to receive from their employers to take home as between themselves, the employer and employee, and before any deductions as required by third parties, are made. The section means that if the private employee under his bargaining agreement is entitled to receive before deductions the sum, for example, of $84.50 for a week's work, the city employee, performing the same services, is likewise entitled to receive the same amount for his week's work. The section and the foregoing decisions seem to be so clear on the point, no further discussion thereof appears to be appropriate.'

"Under the above definition it is clear that in the instant case the plaintiffs were not receiving the same 'take home pay' as their counterparts in private industry, because of the compulsory deduction by the employer for the city's health plan . . . ."

The original contract, which was the basis of the certification as to the rate of pay for the classes involved in your request, was executed by the Western Greyhound Lines as the employer and the Automotive Machinists Lodge No. 1305, International Association of Machinists, for and on behalf of the employees. This agreement was effective from June 1, 1959 to May 31, 1962.

The Civil Service Commission pursuant to the provisions of Section 151.3 found and certified that the rate provided for in the contract met all the requirements of the section and in July, 1959, July, 1960 and July, 1961, certified to the Board of Supervisors that this was the rate of pay to which persons in the various Automotive Machinists classes were entitled to be paid for the fiscal years 1959-60, 1960-61 and 1961-62 respectively.

As is pointed out by you in your request, the sum of money being paid by the Western Greyhound into the joint welfare trust fund was not being paid pursuant to the collective bargaining agreement but on some other basis. Consequently at the time of certification of this rate by the Civil Service Commission the collective bargaining agreement made no mention of the fact that Greyhound was making a health and welfare contribution to the trust fund.

In July, 1959, a letter dated July 13th was filed with the Civil Service Commission which reads as follows:

"Mr. J.P. Andersen, Business Representative
Automotive Machinists Lodge No. 1305
International Association of Machinists
1750 Market Street
San Francisco, Calif.

"Dear Mr. Andersen:

"Per your request I am setting forth the understanding regarding the Health and Welfare Plan coverage, which is not covered in the collective bargaining agreement between Automotive Machinists Lodge No. 1305, International Association of Machinists, and Western Greyhound Lines (Division of The Greyhound Corporation) covering mechanical employees in our San Francisco shops.

"In accordance with understanding, 'A Welfare Plan shall be provided and made part of the agreement, which shall be the same as the Welfare Plan heretofore existing, except that it shall be for the sole benefit of members of Automotive Machinists Lodge No. 1305, their dependents

and such other employees mutually agreed upon by the Trustees. The Company shall pay to the Administrator of the said Welfare Fund the premium and administrative cost as provided for in the new Trust Agreement. The present level of benefits shall be maintained during the life of the agreement.'

Yours very truly,

F. W. Ackerman
President

"The foregoing correctly sets forth understanding and is hereby accepted.

"AUTOMOTIVE MACHINISTS LODGE NO. 1305
INTERNATIONAL ASSOCIATION OF MACHINISTS

"_____/s/ John P. Andersen_____"

The time stamp on the above letter shows that it was received by the Civil Service Commission on July 30, 1959. There is no dispute that the letter was received on or about this date. The purpose of the letter is apparent. It is an attempt to establish factually that the health and welfare payments made by Western Greyhound meet the requirements of the provisions of Section 151.3. Whether the letter constitutes a modification of the agreement to the extent that the agreement thereafter provides for a sum of money to be paid by the Western Greyhound on behalf of its employees into the trust fund is the gist of the question propounded in your request.

The letter quoted above which states the understanding between the parties is signed by the same corporation that executed the original collective bargaining agreement. Similarly the acknowledgment of the understanding is made by the same representative of the same union that signed the original contract. The letter therefore, in effect, is a modification of the original contract. It has been held that written modifications may be evidenced by letters. (See Texas Co. v. Todd, 19 C.A. 2d 174.) Similarly the modification is as much a contract as the original contract was. (See Main St. and A.P.R. Co. v. Los Angeles Traction Co., 129 Cal. 301.) Therefore the letter should be accorded the same dignity as the contract itself.

Reviewing the contents of the letter, it is my opinion that it meets all the tests laid down by Section 151.3 and the law found in Martin v. City and County of San Francisco, supra. The understanding recited in the letter that a payment was being made by the employer to the trust fund on behalf of employees makes it, under the interpretation of the Martin case, supra, a part of the employees' rate of pay as that term is used in Section 151.3 of the Charter. At page 576 of the opinion, the District Court of Appeal states:

> "While it is true that the benefits received by employees from the health and welfare trust fund are contingent in nature like sick leave and disability pay, the payments made to the fund by the employer are also fixed sums for a definite period and easily ascertainable. This is the crux of the problem. The proper classification of the payments made by the employers under the collective bargaining agreements, not the benefits received by the employee."

Your request indicates that the Western Greyhound pays $12.94 on behalf of employees to the trust fund. Since similar payments have been construed in the Martin case, supra, as part of the rate of pay, as that term is used in Section 151.3 of the Charter, it is my opinion that the sum being paid by Western Greyhound to the trust fund is a part of the employees' concerned rate of pay.

This sum however, must be reduced by the amount of any contribution that the City is making, on behalf of its employees, to purchase benefits similar to those provided under the trust agreement. For example, the City's contribution to the Health Service System and the cost to the City of the death benefit under the Retirement System must be deducted therefrom.

From the facts presented in your request the increase in the rate of pay brought about by the execution of the modification would not be effective until July 1, 1960. The provisions of Section 151.3 of the Charter, insofar as they pertain to the action of the Civil Service Commission and the Board of Supervisors when reviewing and setting wages for the classes involved after July 1 of any fiscal year, read as follows:

> "The rate of pay so fixed by the Board of Supervisors shall be determined on the basis of rates of pay certified by the Civil Service Commission on or prior to April 1 of each year and shall be effective July 1 following,

provided that the Civil Service Commission shall review all such agreements as of July 1 each year and certify to the Board of Supervisors on or before the second Monday of July any modifications in rates of pay for such crafts or groups as herein provided."

Unless there are other facts, which have not been presented to me, I advise you that since the Health and Welfare contribution was not provided for in the Collective Bargaining Agreement on July 1, 1959, and the letter reciting the understanding was not received until after the second Monday in July (see Butler v. City and County of San Francisco, 104 C.A. 2d 126), the Civil Service Commission could not certify it to the Board of Supervisors as part of the rate of pay for the classes covered for the fiscal year 1959-60.

As to the fiscal years 1960-61 and 1961-62, the Civil Service Commission is under a duty to correct its certification for these classes to an amount that would take into consideration the sum Western Greyhound is paying into the trust fund adjusted as outlined above.

The departments employing the classifications covered by the collective bargaining agreement should be advised to prepare time rolls for the fiscal years 1960-61 and 1961-62 to reflect this additional sum of money. If a new contract is executed with a different rate of contribution or a continuance of the old rate, such sum, adjusted as provided herein, should be certified to the Board of Supervisors as part of the rate of pay of these classes for the fiscal year 1962-63.

You are advised accordingly.

Respectfully submitted,

THOMAS M. O'CONNOR
City Attorney

To: Mr. George J. Grubb
General Manager, Personnel
Civil Service Commission
151 City Hall
San Francisco 2, California

BJW/RJR

OPINION NO. 62-24

May 10, 1962

SUBJECT: MERITORIOUS PUBLIC SERVICE NO LONGER CONSIDERED IN PROMOTIVE EXAMINATIONS, FIRE DEPARTMENT, UNDER SECTION 146(h) OF THE CHARTER

Dear Sir:

Your request for an opinion is as follows:

REQUEST

"The Civil Service Commission at its meeting of April 19, 1962, had for consideration the request of Arthur Greggains for additional credits in the current examination for Battalion Chief, Fire Department, Class H40. Mr. Greggains is serving under permanent appointment in the class of H30 Captain, Fire Department, one of the next lower ranks in the examination. He was given a Class 'B' award by the Fire Department on August 15, 1951, for an act of meritorious service performed in line of duty.

"Prior to the effective date of the last amendment to Charter Section 146, passed by the electorate on November 3, 1953 and ratified by the Legislature on March 5, 1954, four percent of the total credits allowable in a promotive examination in the uniform force of the Fire Department was allowed participants who had to their credit awards for acts of meritorious public service for which they had not previously received such points in an examination for promotion. These points were allocated according to the degree of the award, a Class 'B' award being given 20 of the 40 points allowable out of the 1000 point total in the examination.

"When the last amendment to Charter Section 146 became effective on March 5, 1954, the Civil Service Commission interpreted the amendment as having the effect of abolishing the subject of meritorious public service as an integral part of total points to be allowed in promotive examinations in the uniform force of the Fire Department. We refer particularly to Charter Section 146 (h) which provides for points for a 'clean record' in the Fire Department but makes no mention of the

subject of acts of meritorious public service. In Charter Section 146 (d) specific reference is provided for such acts in promotive examinations within the Police Department.

"It was the order of the Civil Service Commission that your opinion be requested as follows:

"Does Charter Section 146, as amended effective March 5, 1954, abolish consideration of meritorious public service awards as a factor to be included in the total points allowed in promotive examinations for the uniformed ranks of the Fire Department?"

O P I N I O N

Section 146 of the Charter sets forth the manner in which the Civil Service Commission shall conduct and rate promotional examinations for employees of the city and county. Paragraphs (e), (f), (g), and (h) of this section apply specifically to the Fire Department. You have directed your inquiry to paragraph (h). This paragraph prior to the amendment effective March 5, 1954, read as follows:

> "In addition to the foregoing credits for seniority ten per cent of the total credits allowed for said examinations shall be allowed for ascertained merit and meritorious public service; sixty per cent of said ten per cent to be allowed to each applicant for a clean record in the department, and forty per cent of said ten per cent shall be the maximum which may be allowed for acts of meritorious public service according to the judgment of the commission."

With the adoption of the amendment in 1954, the section was amended to read as follows:

> "In addition to the foregoing credits for seniority six per cent of the total credits allowed for said examinations shall be allowed to each applicant for a clean record in the department."

The same amendment which made the above change in paragraph (h) of Section 146 made a similar change in paragraph (i) of the same section. This change repealed the language in paragraph (i) which concerned meritorious public service. Paragraph (i) prior to the amendment in 1954, read as follows:

"In promotional examinations in the police and fire departments, seniority of service, meritorious public service and ascertained merit and a clean record in the respective departments shall be added to the credit obtained by the applicant in the written portion of said examination, and shall be taken into consideration by the commission in determining his passing mark and his place upon the list of eligibles."

Since the effective date of the amendment which was May 5, 1954, this paragraph now reads as follows:

"In promotional examinations in the police and fire departments, seniority of service, and a clean record in the respective departments shall be added to the credit obtained by the applicant in the written portion of said examination, and shall be taken into consideration by the commission in determining his passing mark and his place upon the list of eligibles."

Thus the total percentage of points that were to be credited in the promotional examination in the Fire Department under the provisions of section (h) were reduced from ten per cent to six per cent and that portion of the section which read "and forty per cent of said ten per cent shall be the maximum which may be allowed for acts of meritorious public service according to the judgment of the commission" was repealed. Similarly, reference to meritorious public service in paragraph (i) was repealed. These changes preclude the Civil Service Commission, in any future promotional examinations in the Fire Department subsequent to their effective dates, from allowing any participant additional credits for acts of meritorious public service regardless of when the award was made.

Promotional examinations for members of the uniform ranks of the Police Department are covered by paragraph (d) of Section 154. This paragraph specifically refers to the credit to be given members of the Police Department in promotional examinations. Prior to the 1954 amendment, paragraph (d) and paragraph (h) contained the identical language. The amendment, however, rephrased paragraph (d) in such a way that the first portion thereof now reads the same as paragraph (h), but additional language was appended to paragraph (d) which is not found in paragraph (h). This additional language reads as follows:

"All members of the department who have performed acts of meritorious public service and have not heretofore received credit for such meritorious public service in a promotional examination and all members of the department who shall perform acts of meritorious public service prior to the effective date of this amendment shall be allowed in addition a maximum of four credits for said examination according to the judgment of the commission. Credits for meritorious public service, in a promotional examination within the police department shall not be allowed by the Civil Service Commission except as herein provided."

The saving language which was added to paragraph (d) permits a member of the Police Department who has received a meritorious public award prior to May 5, 1954 and who has not received credit for this award in a promotional examination, to apply for and receive credit at the present time if he is taking a promotional examination in the Police Department.

Paragraphs (h) and (i) of Section 146 do not contain any saving clause similar to that found in paragraph (d). Consequently, the Civil Service Commission cannot include as a factor in the total points allowed in a promotional examination in the uniform ranks of the Fire Department any credit for meritorious service performed by members of the Fire Department.

Therefore, I advise you that the amendment to Section 146 (h) and (i) which became effective May 5, 1954, revokes the authority of the Commission to consider acts of meritorious public service in rating a participant's examination paper in a promotional examination in the Fire Department.

Respectfully submitted,

THOMAS M. O'CONNOR
City Attorney

To: Mr. George J. Grubb
General Manager of Personnel
Civil Service Commission
151 City Hall
San Francisco 2, California

BJW/RJR

OPINION NO. 62-24

May 10, 1962

SUBJECT: MERITORIOUS PUBLIC SERVICE NO LONGER CONSIDERED IN PROMOTIVE EXAMINATIONS, FIRE DEPARTMENT, UNDER SECTION 146(h) OF THE CHARTER

Dear Sir:

Your request for an opinion is as follows:

REQUEST

"The Civil Service Commission at its meeting of April 19, 1962, had for consideration the request of Arthur Greggains for additional credits in the current examination for Battalion Chief, Fire Department, Class H40. Mr. Greggains is serving under permanent appointment in the class of H30 Captain, Fire Department, one of the next lower ranks in the examination. He was given a Class 'B' award by the Fire Department on August 15, 1951, for an act of meritorious service performed in line of duty.

"Prior to the effective date of the last amendment to Charter Section 146, passed by the electorate on November 3, 1953 and ratified by the Legislature on March 5, 1954, four percent of the total credits allowable in a promotive examination in the uniform force of the Fire Department was allowed participants who had to their credit awards for acts of meritorious public service for which they had not previously received such points in an examination for promotion. These points were allocated according to the degree of the award, a Class 'B' award being given 20 of the 40 points allowable out of the 1000 point total in the examination.

"When the last amendment to Charter Section 146 became effective on March 5, 1954, the Civil Service Commission interpreted the amendment as having the effect of abolishing the subject of meritorious public service as an integral part of total points to be allowed in promotive examinations in the uniform force of the Fire Department. We refer particularly to Charter Section 146 (h) which provides for points for a 'clean record' in the Fire Department but makes no mention of the

subject of acts of meritorious public service. In Charter Section 146 (d) specific reference is provided for such acts in promotive examinations within the Police Department.

"It was the order of the Civil Service Commission that your opinion be requested as follows:

"Does Charter Section 146, as amended effective March 5, 1954, abolish consideration of meritorious public service awards as a factor to be included in the total points allowed in promotive examinations for the uniformed ranks of the Fire Department?"

O P I N I O N

Section 146 of the Charter sets forth the manner in which the Civil Service Commission shall conduct and rate promotional examinations for employees of the city and county. Paragraphs (e), (f), (g), and (h) of this section apply specifically to the Fire Department. You have directed your inquiry to paragraph (h). This paragraph prior to the amendment effective March 5, 1954, read as follows:

"In addition to the foregoing credits for seniority ten per cent of the total credits allowed for said examinations shall be allowed for ascertained merit and meritorious public service; sixty per cent of said ten per cent to be allowed to each applicant for a clean record in the department, and forty per cent of said ten per cent shall be the maximum which may be allowed for acts of meritorious public service according to the judgment of the commission."

With the adoption of the amendment in 1954, the section was amended to read as follows:

"In addition to the foregoing credits for seniority six per cent of the total credits allowed for said examinations shall be allowed to each applicant for a clean record in the department."

The same amendment which made the above change in paragraph (h) of Section 146 made a similar change in paragraph (i) of the same section. This change repealed the language in paragraph (i) which concerned meritorious public service. Paragraph (i) prior to the amendment in 1954, read as follows:

"In promotional examinations in the police and fire departments, seniority of service, meritorious public service and ascertained merit and a clean record in the respective departments shall be added to the credit obtained by the applicant in the written portion of said examination, and shall be taken into consideration by the commission in determining his passing mark and his place upon the list of eligibles."

Since the effective date of the amendment which was May 5, 1954, this paragraph now reads as follows:

"In promotional examinations in the police and fire departments, seniority of service, and a clean record in the respective departments shall be added to the credit obtained by the applicant in the written portion of said examination, and shall be taken into consideration by the commission in determining his passing mark and his place upon the list of eligibles."

Thus the total percentage of points that were to be credited in the promotional examination in the Fire Department under the provisions of section (h) were reduced from ten per cent to six per cent and that portion of the section which read "and forty per cent of said ten per cent shall be the maximum which may be allowed for acts of meritorious public service according to the judgment of the commission" was repealed. Similarly, reference to meritorious public service in paragraph (i) was repealed. These changes preclude the Civil Service Commission, in any future promotional examinations in the Fire Department subsequent to their effective dates, from allowing any participant additional credits for acts of meritorious public service regardless of when the award was made.

Promotional examinations for members of the uniform ranks of the Police Department are covered by paragraph (d) of Section 154. This paragraph specifically refers to the credit to be given members of the Police Department in promotional examinations. Prior to the 1954 amendment, paragraph (d) and paragraph (h) contained the identical language. The amendment, however, rephrased paragraph (d) in such a way that the first portion thereof now reads the same as paragraph (h), but additional language was appended to paragraph (d) which is not found in paragraph (h). This additional language reads as follows:

"All members of the department who have performed acts of meritorious public service and have not heretofore received credit for such meritorious public service in a promotional examination and all members of the department who shall perform acts of meritorious public service prior to the effective date of this amendment shall be allowed in addition a maximum of four credits for said examination according to the judgment of the commission. Credits for meritorious public service, in a promotional examination within the police department shall not be allowed by the Civil Service Commission except as herein provided."

The saving language which was added to paragraph (d) permits a member of the Police Department who has received a meritorious public award prior to May 5, 1954 and who has not received credit for this award in a promotional examination, to apply for and receive credit at the present time if he is taking a promotional examination in the Police Department.

Paragraphs (h) and (i) of Section 146 do not contain any saving clause similar to that found in paragraph (d). Consequently, the Civil Service Commission cannot include as a factor in the total points allowed in a promotional examination in the uniform ranks of the Fire Department any credit for meritorious service performed by members of the Fire Department.

Therefore, I advise you that the amendment to Section 146 (h) and (i) which became effective May 5, 1954, revokes the authority of the Commission to consider acts of meritorious public service in rating a participant's examination paper in a promotional examination in the Fire Department.

Respectfully submitted,

THOMAS M. O'CONNOR
City Attorney

To: Mr. George J. Grubb
General Manager of Personnel
Civil Service Commission
151 City Hall
San Francisco 2, California

BJW/RJR

OPINION NO. 62-25

May 15, 1962

SUBJECT: DOG LEASH ORDINANCE: APPLICATION OF TO PRIVATELY MAINTAINED AREAS SUCH AS PRESIDIO TERRACE.

Dear Sir:

Your request for an opinion is as follows:

R E Q U E S T

"We would like a ruling on whether or not Sec. 44 of the Health Code, (Seizure of Licensed and Unlicensed Dogs) applies to privately maintained areas such as Presidio Terrace?"

O P I N I O N

That portion of Section 44 of the Health Code which is pertinent to your question reads as follows:

"Seizure of Licensed and Unlicensed Dogs. The Poundkeeper shall seize and impound every dog found running at large or found upon any public highway or street, or alley, or court, or place, or public square, or public grounds, or upon any unfenced lot or not within a sufficient enclosure within the City and County of San Francisco, whether in the immediate presence of the owner or otherwise; provided, however, that no such seizure or impounding shall be made of any licensed dog led by a string, rope, or chain or otherwise securely leashed and led."

The streets located within Presidio Terrace are private property and are assessed to the Presidio Terrace Association. The streets have never been dedicated to nor accepted by the City and County of San Francisco. Therefore, within the meaning of Section 44 the streets located in Presidio Terrace are not a ". . . . public highway or street . . . . or public square, or public grounds . . . ." It will be noted, however, that Section 44 omits any reference to or use of the word "public" preceding the words " . . . . alley, or court, or place . . . . unfenced lot or not within a sufficient enclosure . . . ." Omission of the word public indicates that the legislators of Section 44 intended that the ordinance shall apply to any alleys, courts, places, unfenced lots and insufficient enclosures without regard to their form of ownership. Even though the streets in Presidio Terrace are not public they can be considered as a "court or place" within the meaning of the dog leash ordinance and hence subject to its scope of regulation.

Moreover Presidio Terrace is an area which is not fully enclosed since the gates at its entrance usually remain open.

The primary and controlling consideration in the construction of a statute is a determination of and giving effect to legislative intent (County of Alameda v. Kuchel, 32 Cal. 2d 193) and the leash ordinance was enacted to promote the health, safety and general welfare of the entire community. The wording of Section 44 indicates that its legislators intended that said ordinance should have a broad scope of application to achieve the object and purpose of its enactment.

In my opinion the language and intent of Section 44 of the Health Code clearly indicates that said ordinance is applicable to and affords jurisdiction over privately maintained areas such as Presidio Terrace.

You are advised accordingly.

Respectfully submitted,

THOMAS M. O'CONNOR
City Attorney

TO: Mr. James N. Brown
Shelter Superintendent
Public Pound
2500 16th Street
San Francisco, Calif.

MCK/TJB

OPINION NO. 62-26

May 16, 1962

SUBJECT: POWER OF BOARD OF SUPERVISORS TO ENACT ORDINANCE COMPELLING OWNERS OF DETERIORATED PROPERTY TO REMOVE IMPROVEMENTS AND UTILIZE LAND FOR PARKING

Dear Sir:

Your request for an opinion is as follows:

REQUEST

"At the meeting of the Board of Supervisors held yesterday, Supervisor James Leo Halley called the attention of his colleagues to the continued maintenance of unused and unsightly buildings in certain sections of San Francisco, particularly in an area adjacent to the Financial District, which represent an eyesore and which are not utilized to the maximum benefit of the community insofar as economics or aesthetics are concerned.

"Supervisor Halley would like to know whether or not the Board of Supervisors has the power to enact an ordinance which would compel owners of deteriorated buildings to remove said improvements and utilize the land for automobile parking purposes. He will appreciate your early response."

OPINION

If the properties referred to in your request constitute a public nuisance, the buildings thereon may be abated by the City and County of San Francisco. (See: Sec. 731, Code of Civil Procedure; Ss. 3479, 3480, 3482, 3491, 3494, Civil Code; Sec. 17960, et seq., Health and Safety Code; Sec. 801, et seq., San Francisco Building Code.)

Section 3479, Civil Code, provides as follows:

"Anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway is a nuisance."

Section 804 of the San Francisco Building Code provides as follows:

> "(a) General. All buildings, structures, or parts thereof, which are structurally unsafe or not provided with adequate egress, or which constitute a fire hazard, or are otherwise dangerous to human life, or which in relation to existing approved use constitute a hazard to safety by reason of inadequate maintenance, dilapidation, obsolescence or abandonment, or were erected, altered or moved without a permit, or are hereafter erected, altered, constructed or maintained in violation of this Code, are for the purpose of this section unsafe buildings. All such unsafe buildings are hereby declared to be public nuisances and shall be abated by the Director, as hereinafter provided."
>
> (See also: Takata v. City of Los Angeles, 184 C.A. 2d 154 (1960); Stoetzner v. City of Los Angeles, 170 C.A. 2d 394 (1959); People v. Vasquez, 144 C.A. 2d 575 (1956); People v. Oliver, 86 C.A. 2d 885 (1949).

While action may be taken by the city and county to cause the removal of a public nuisance, the Board is not empowered to restrict by ordinance the use of such land solely to parking purposes. To require the owner to construct a parking lot thereon and use his land solely for parking purposes would amount to a confiscation of his property, without just compensation, and without due process of law in violation of both the Federal and State Constitutions. (U.S. Constitution, 5th and 14th Amendments; California Constitution, Sec. 14, Article I.)

In Vernon Park Realty, Inc. v. City of Mount Vernon, 122 N.Y.S. 2d 78 (1953); Affd. 282 App. Div. 890, 125 N.Y.S. 2d 112; Affd. 121 N.E. 2d 517 (1954), where the municipality sought by a zoning ordinance to restrict the use of unimproved property to parking and to prohibit its use for business and commercial purposes, the Court held the ordinance unconstitutional. The Court on appeal said in 121 N.E. 2d:

> "The city justifies the ordinance and its amendment by reason of the congested traffic and parking conditions now existing in Mount Vernon which, it says, have become so acute as to reach a strangulation point. However compelling and acute the community traffic problem

may be, its solution does not lie in placing an undue and uncompensated burden on the individual owner of a single parcel of land in the guise of regulation, even for a public purpose. True it is that for a long time the land has been devoted to parking, a non-conforming use, but it does not follow that an ordinance prohibiting any other use is a reasonable exercise of the police power. [p. 519.]

"Under such circumstances, the 1927 zoning ordinance and zoning map and the 1952 amendment, as they pertain to the plaintiff's property, are so unreasonable and arbitrary as to constitute an invasion of property rights, contrary to constitutional due process and, as such, are invalid, illegal and void enactments. U.S. Const. 5th and 14th Amends.; N.Y. Const. art. I, §§ 6, 7; Rockdale Construction Corporation v. Incorporated Village of Cedarhurst, Nassau County, 301 N.Y. 519, 93 N.E. 2d 76; Arverne Bay Construction Co. v. Thatcher, supra; Dowsey v. Village of Kensington, supra; Eaton v. Sweeny, supra; Euclid, Ohio v. Ambler Co., 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303; Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 43 S. Ct. 158, 67 L. Ed. 322; Town of Islip v. F. E. Summers Coal & Lumber Co., 257 N.Y. 167, 177 N.E. 409." [p. 520.]

In Kissinger v. City of Los Angeles, 161 C.A. 2d 454, where the City Council attempted to spot zone certain property, the Court said at page 460:

" . . . We are of the opinion that the present ordinance is arbitrary, discriminatory and that it in effect, is an attempt on the part of the city to use its police power to take plaintiff's property without due process of law and without payment of compensation for that taking."

You are advised accordingly.

Respectfully submitted,

THOMAS M. O'CONNOR
City Attorney

TO: Mr. Robert J. Dolan
Clerk of the Board
Board of Supervisors
235 City Hall
San Francisco 2, California

RJH/TJB

OPINION NO. 62-27

May 17, 1962

SUBJECT: BROWN ACT ("Secret Meeting Law") - APPLICABILITY TO MEETINGS OF JUVENILE JUSTICE COMMITTEE

Dear Sir:

You have requested an opinion as follows:

REQUEST

"Under the provisions of the new Juvenile Court Law, which took effect September 15, 1961, the Juvenile Probation Committee has been re-designated as the Juvenile Justice Commission.

"At a meeting of said Commission on December 7, 1961, at which were present Mr. Thomas F. Strycula, Chief Juvenile Probation Officer, and The Honorable Melvyn I. Cronin, Judge of the Juvenile Court, the question arose whether the so-called Brown Act (Section 54954 of Chapter 9 of the Government Code) requires that meetings of the Juvenile Justice Commission be held openly, as is necessary for certain other types of governmental bodies.

"There is some question that the Juvenile Justice Commission is exempt from the foregoing provisions because it is a lay advisory body having no administrative or other type of authority. The Juvenile Justice Commission wants to comply with any requirements on open meetings as statutes demand. However, because it differs substantially from other legislative and administrative bodies, is it your opinion that the Commission need not hold open meetings?"

OPINION

The Brown Act or "Secret Meeting Law" (Stats. 1953, Ch. 1588, Sec. 1; Government Code Secs. 54950-58) was enacted in 1953 to ensure that meetings of local public agencies and legislative bodies be held openly.

As originally enacted it provided that all meetings of the legislative body of a local agency be open and public, and all persons be permitted to attend any meeting of the legislative body of a local agency, except as otherwise provided in the chapter

(Government Code, Sec. 54953). (All references are to the Government Code unless otherwise stated herein.) The only exception referred to in Section 54953 was found in Sec. 54957 and related to executive hearings to consider the employment or dismissal of a public officer or employee or to hear complaints or charges brought against such officer or employee unless the officer or employee requested a public hearing. Witnesses could also be excluded from the hearing during the examination of another witness.

A "legislative body" was defined as the governing board, commission, directors or body of a local agency, or any board or commission thereof (Sec. 54952).

A "local agency" was defined as a county, city, city and county, town, school district, municipal corporation, district, political subdivision, or any board, commission or agency thereof, or other local public agency (Sec. 54951). In 1959 Section 54951 was amended to specifically include chartered cities within the definition of "local agency." (Stats. 1959, Ch. 1417, Sec. 1)

The Juvenile Justice Commission was created pursuant to State law (Stats. 1961, Ch. 1616, Sec. 2, Welfare and Institutions Code Sec. 525). Its members are officers of the City and County of San Francisco (Charter Sec. 4) and it is recognized that it was created by State law and that its powers and duties are fixed by State law (Charter Sec. 58).

The members of the Commission receive no compensation but are to be reimbursed by the county of appointment for their actual and necessary expenses incurred in the performance of their duties (Welfare and Institutions Code Sec. 531). In this respect I have been advised that city and county funds are appropriated annually for this purpose. In addition, the Juvenile Court and its authorized officers and employees are authorized to acquire and maintain membership in certain designated organizations, one of which is the California Probation, Parole and Correctional Association (S. F. Adm. Code Sec. 16.6(7)). I have been further advised that city and county funds are appropriated annually for the maintenance of membership in this organization in the name of each of the eleven members of the Juvenile Justice Commission.

In 1961, the Legislature amended the Brown Act in certain respects (Stats. 1961, Ch. 167).

Sec. 54952 was amended to read:

"§54952. 'Legislative body.' As used in this chapter, 'legislative body' means the governing board, commission, directors or body of a local agency, or any board or commission thereof, and shall include any board, commission, committee, or other body on which officers of a local agency serve in their official capacity as members and which is supported in whole or in part by funds provided by such agency, whether such board, commission, committee or other body is organized and operated by such local agency or by a private corporation." (Emphasis added)

Sec. 54952.5 was added and reads as follows:

"§54952.5. Same. As used in this chapter 'legislative body' also includes, but is not limited to, planning commissions, library boards, recreation commissions, and other permanent boards or commissions of a local agency."

Sec. 54959 was added and reads as follows:

"§54959. Participation in deliberations in violation of this chapter a misdemeanor. Each member of a legislative body who attends a meeting of such legislative body where action is taken in violation of any provision of this chapter, with knowledge of the fact that the meeting is in violation thereof, is guilty of a misdemeanor."

The 1961 amendment to Sec. 54952, broadening the definition of "legislative body" to include any board, commission or other body supported by public funds on which local officials serve in their official capacity and the addition of Sec. 54952.5 to expressly include planning commission, library boards, recreation boards, and other permanent boards or agencies within the definition of "legislative body," in my opinion, clearly indicates that the Juvenile Justice Committee is subject to the provisions of the Brown Act and therefore its meetings must be held openly except as provided in Sec. 54957, relating to executive hearings.

You are advised accordingly.

Respectfully submitted,

THOMAS M. O'CONNOR
City Attorney

TO: Mr. Roy N. Buell, Chairman
Juvenile Justice Commission
Juvenile Probation Office
375 Woodside Avenue
San Francisco 27, California

JJS/TJB

OPINION NO. 62-28

May 25, 1962

SUBJECT: USE OF PORTION OF MARGARET HAYWARD PLAYGROUND AREA FOR FIRE DEPARTMENT HEADQUARTERS

Dear Sir:

Your request for an opinion is as follows:

REQUEST

"It has been suggested that the new headquarters for the Fire Department be located within the Margaret Hayward Playground area of Jefferson Square as shown on the attached diagram.

"Jefferson Square was reserved to the City for park purposes under the provisions of the Van Ness Ordinance (Order No. 822) and Order No. 845.

"On May 7, 1914, by Ordinance No. 2732 (New Series) the Board of Supervisors set aside an area in the southerly portion of Jefferson Square for a Central Station for the Fire Alarm and Police Telegraph, and on May 14, 1914 by Ordinance No. 2749 (New Series) set aside an additional area for the same purpose.

"In 1920-1922, we understand that the Park Commission transferred the remainder of the southerly half of Jefferson Square to the Recreation Commission for the purpose of a children's playground.

"In view of the fact that Jefferson Square was reserved to the City for park purposes, your opinion is requested, as follows:

1. May a transfer of jurisdiction of the needed land area of the Margaret Hayward Playground (the southerly half of Jefferson Square) be made from the Recreation and Park Commission to the Fire Department as a site for its new headquarters.

2. If a transfer of jurisdiction cannot be made, may the City nevertheless construct the new Fire Department headquarters on the land in the administration of its municipal affairs or any other reason. A somewhat similar situation seems to have been considered in Wiley v. Berkeley 136 C.A. 2d 10.

"Please let us have your opinion at the earliest opportunity."

O P I N I O N

The history of the establishment of the Margaret Hayward Playground is, for the most part, as outlined in your request. However, a few additional details are necessary in order to understand the law applicable to its use. This playground was originally a part of a two-block square known as Jefferson Square reserved by the City for park purposes under the provisions of the Van Ness Ordinance enacted in 1855. It was a part of the land contained in the Pueblo Land Grant to the City and County as successor to the Mexican Pueblo of Yerba Buena and which was confirmed to the City by both the Federal and State governments.

The Central Fire Alarm Station which occupies a part of the southerly portion of the square (now Margaret Hayward Playground) was authorized by an amendment in 1912 to the 1898 Charter (see Article XIV, Section 6a, Charter of 1898, approved by the Legislature in 1913) which permitted the Board of Supervisors by ordinance to set aside a portion of Jefferson Square for the Central Fire Alarm building (see City Attorney Opinion, February 20, 1914). Pursuant to this authority, the Board of Supervisors authorized the use of this portion of the Square by enactment of two ordinances in 1914.

Article XIV-A, Sec. 9 of the 1898 Charter provided that, with the exception of Golden Gate Park and Mission Park, the Park Commission could set aside squares or portions thereof for use as recreation centers under the control of the Playground Commission (later called Recreation Commission). As pointed out in your request, the Park Commission in 1922 set aside the southern half of Jefferson Square as a playground under the jurisdiction of the Playground Commission and it is in this portion of the Square, which is now designated Margaret Hayward Playground, that the Fire Department desires to erect its headquarters.

When the Recreation and the Park Departments were consolidated into the Recreation and Park Department in 1949, the area in question came under the jurisdiction of the newly created department and is presently under its control and management.

In 1949 Section 41.1 was added to the Charter, which reads as follows:

> "Section 41.1. <u>Sale, Abandonment or Discontinuance of Use of Land Held for Park Purposes</u>. Notwithstanding any other provisions of this charter, whenever lands which are or shall be used or intended for use for parks or squares are no longer needed for park or recreational purposes, such lands may be sold or otherwise disposed of, or their use for park purposes may be abandoned or discontinued; provided that nothing herein shall be construed to authorize the discontinuance or abandonment

of the use of such lands, or any change in the use thereof which will cause the reversion of such lands to private ownership, or cause the forfeiture of the ownership thereof in fee by the City and County of San Francisco, or as authorizing the discontinuance of the use of park lands acquired in any proceeding wherein a local assessment based on benefits was or shall be levied to provide funds for such acquisition; and provided further that the general laws of the State of California authorizing municipal corporations to abandon or to discontinue the use of land for park purposes, authorizing the sale or other disposition of such lands, and providing procedures therefor and for matters relating thereto, shall be applicable to the City and County of San Francisco and to all lands held or used by it for park purposes and shall govern and control exclusively in respect thereto."

This section provides the exclusive method whereby lands which are intended to be used for park purposes and which are no longer needed for park or recreational purposes, can be sold or otherwise disposed of, or their use abandoned or discontinued. In providing this exclusive method, the section incorporates and makes applicable to San Francisco the general law of the State of California as to how municipal corporations may abandon or discontinue park lands, or the use of land for park purposes, and how they may dispose of the land and the procedure for its disposition. The general law of the state appears in the Government Code under a chapter entitled "Discontinuance of Parks" and an article entitled "Parks Dedicated by City." These sections read as follows:

"§38440. Abandonment and disposal; authority

"A city may discontinue and abandon the use as a public park of any land owned in fee by it and dedicated or placed in such use by such city, and thereafter dispose of the land, pursuant to this article."

"§38441. Exchanges; authority; conditions

"Without a special election, the legislative body may convey a minor portion of such a park in exchange for an equal or greater area or value of privately owned land contiguous to the park after:

"(a) Notice and a public hearing pursuant to this article.

"(b) Determination that the exchange is in the public interest.

"(c) Adoption of a resolution of discontinuance."

"§38442. Prohibited discontinuances

"Except as provided in Section 38441, this article shall not be construed to authorize:

"(a) A discontinuance and abandonment, or change in the use, of such lands which will cause the reversion of the lands to private ownership or a forfeiture of the city's ownership in fee.

"(b) The discontinuance of the use of park lands acquired by funds obtained from a local assessment based on benefits."

"§38443. Initiation of proceedings; resolution

"Proceedings are initiated when the legislative body adopts a resolution declaring that public interest or convenience requires the discontinuance of the use of such land as a public park, and that the legislative body intends to call a special election to submit the question of discontinuance to the city electors."

"§38444. Resolution; contents

"The resolution shall:

"(a) Contain an accurate description of the lands.

"(b) State the common name of the park.

"(c) State the disposition which the legislative body proposes to make of the park.

"(d) Fix a time, not less than thirty nor more than sixty days after adoption of the resolution, and a place, at which the public or persons particularly interested may protest."

"§38445. Resolution; publication

"The city clerk shall cause the resolution to be published twice in a daily newspaper published and circulated in the city, or if there is none, twice in a weekly or semiweekly newspaper so published and

circulated. If there are no such newspapers, the resolution shall be published twice in a newspaper published in the county. Publication shall be completed at least twenty days before the time set for the hearing."

"§38446. Notices of resolution; posting

"The park superintendent or another person designated by the legislative body shall cause at least three notices of the adoption of the resolution to be posted conspicuously not more than three hundred feet apart along the exterior boundaries of the area proposed to be discontinued and abandoned as a public park. Posting shall be completed at least twenty days before the time set for the hearing. Failure to post the notices does not invalidate the proceedings or prevent the legislative body from acquiring jurisdiction to proceed with the discontinuance and abandonment."

"§38447. Notices of resolution; heading and contents

"The posted notices shall be headed: 'Notice of proposed discontinuance of public park land' in legible characters, state the date of adoption of the resolution, and recite the facts contained in the resolution."

"§38448. Protests

"At any time before the hour set for the hearing, any person or persons interested may protest in writing against the proposed abandonment and discontinuance, or to the extent thereof. The protest shall be delivered to the clerk of the legislative body."

"§38449. Protests; hearing

"At the time set for the hearing or to which it is postponed, the legislative body shall hear and pass upon all such protests."

"§38450. Protests; rulings; call of special election

"Protests are sustained unless overruled by two-thirds vote of the legislative body. The legislative body may sustain protests as to one portion, and overrule them as to another portion of park land. If protests are overruled, the legislative body may adopt an ordinance calling, and fixing the date of, a special election to submit to the city electors the question of discontinuance and abandonment of the use of park land on which protests were overruled."

"§38451. Special election; affirmative vote; ordinance of discontinuance

"If a majority of the electors voting on the proposition are in favor of it, the legislative body shall adopt an ordinance declaring that use of the land described in the ordinance calling the election for park purposes is discontinued and abandoned."

"§38452. Special election; negative vote; continuance of park

"If less than a majority of such electors vote for it, the legislative body shall not initiate proceedings for discontinuance of the use of such land for park purposes for one year after the election."

"§38460. Effect of ordinance; authority to dispose of property

"When the ordinance becomes effective, the land described in it is deemed held by the city in fee. The city may sell or otherwise dispose of the property in the same manner as it may dispose of other city property no longer required for municipal purposes."

"§38461. Proceeds of sale; bond fund; general fund

"If the land was acquired by money derived from bonds authorized for park purposes, and the land sold, the reasonable market value of the land at the time of adoption of the ordinance shall be transferred to the bond fund from such other municipal fund as the legislative body determines. If the land was not acquired from bond funds and the land is sold, the proceeds from such sale shall be deposited in the general fund of the city."

"§38462. Proceeds of sale; use after deposit in bond fund

"Except as permitted by general laws allowing diversions of bond funds, money so transferred shall be devoted only to the purposes for which the bonds were authorized."

Margaret Hayward Playground, which as the history indicates was originally a part of Jefferson Square, is subject to the provisions of Section 41.1 of the Charter. It was dedicated as a park or square pursuant to the Van Ness Ordinance in 1855 and is presently owned in fee by the City. Parks and squares which were reserved or dedicated by the Van Ness Ordinance have been the subject of a number of opinions of my predecessors (see Opinions No. 28, June 6, 1949; No. 121, February 8, 1950; No. 144, March 27, 1950; and No. 231, August 25, 1950). These opinions concerned the use or disposition of Columbia Square which, like Jefferson Square, was reserved for park purposes by the Van Ness Ordinance. In all of these opinions the officers and departments involved were advised that the only way in which the use of Columbia Square as a park could be abandoned or discontinued was to follow the provisions of Charter Section 41.1 and apply the general state law codified in those sections of the Government Code quoted above.

The provisions of the Administrative Code dealing with the interdepartmental transfer of lands, namely, Sections 23.7-23.17, have no application to the transfer of this land since Section 41.1 of the Charter provides the exclusive method by which park lands can be abandoned or discontinued and it prevails over the provisions of the Administrative Code.

Section 42.2. of the Charter controls the leasing of park lands and the type of structure that may be placed thereon. The pertinent portion of that section reads as follows:

> "Except as provided in section 42.3, the commission shall not lease any part of the lands under its control nor permit the building or maintenance or use of any structure on any park, square, avenue or ground, <u>except for recreation purposes</u>, and each letting or permit shall be subject to approval of the board of supervisors by ordinance." (Emphasis added) [Note: The exception in Sec. 42.3 deals with the leasing of stadium, etc.]

In an opinion written to the Park Commission in 1948 the then City Attorney, John J. O'Toole, advised the Park Commission that any building which was to be erected on Portsmouth Square in San Francisco must be for recreational purposes. He pointed out that two of the proposed buildings, one an office building for the California Centennial Commission, another a model schoolhouse, would not meet this test and therefore could not be erected on the Square (see Opinion No. 4088, March 5, 1948). This subject has been covered by other opinions by the City Attorney's office at different periods. (See Opinions Nos. 3883(1946), 4057 (1948), 4157 (1948), 67 (1949), 250 (1950) and 456 (1951).)

All of these opinions and the authorities cited therein clearly set forth that the use of the term "recreation" implies that the structure must tend towards the enjoyment of all the citizens who use the public park. The facility placed on the park lands must be available to all persons and at all times must be used for recreational purposes.

The planned Fire Department headquarters does not have any of the attributes of a recreational facility. It would be a functional building providing the Department with a headquarters from which it could operate and supervise the various bureaus of the Fire Department. It could not in any way be used for any recreational purpose and its erection on park lands would be a violation of that portion of Section 42.2 of the Charter quoted above.

Therefore I advise you that under the provisions of Section 41.1 of the Charter, no portion of Margaret Hayward Playground could be transferred to the Fire Department for the erection of a headquarters building without a full compliance with the conditions set forth in the sections of the Government Code quoted above. Nor can the Recreation and Park Department permit the erection of the headquarters building on park lands under its control since to do so would be a violation of Section 42.2 of the Charter.

In your request you refer to the case of Wiley v. Berkeley, 136 Cal. App. 2d 10, and indicated that you thought that under the law enunciated in that case it might be possible to erect the Fire Department headquarters on the Margaret Hayward Playground area. I have examined the decision in that case and ascertained that it involved the placing of a fire station on park property in the City of Berkeley. The theory of the Court's opinion was that the erection of a fire station was a municipal affair and that since a charter is only a restriction on the authority of a chartered city to act on municipal affairs, Berkeley could properly erect the fire station. The charter of Berkeley had no prohibition against the use of park land for purposes other than park or recreational purposes. The situation in San Francisco is quite different because of the language of Sections 41.1 and 42.2 of the Charter. Section 41.1 is a restriction upon the City and prohibits the use of park lands for any purpose other than park or recreation unless the abandonment or discontinuance proceedings of the Government Code are followed. Section 42.2 prohibits the erection of any structure on park lands that is not to be used for recreational purposes.

Respectfully submitted,

THOMAS M. O'CONNOR
City Attorney

TO: Mr. Philip L. Rezos
Director of Property
450 McAllister Street
San Francisco 2, Calif.

BJW/LSM

OPINION NO. 62-29

June 18, 1962

SUBJECT: J-78 STOCKMAN, APPLICATION OF SECTION 151.3 OF THE CHARTER, WHERE MORE THAN ONE RATE OF PAY EXISTS

Dear Sir:

Your request for an opinion is as follows:

REQUEST

"In January 1962 we received a letter from Mr. Leon Ardzrooni, Attorney for Warehouse Union Local 860 and Local 12, requesting that the compensation for certain employees now classified as J-78 Stockman, in positions located at the 1440 Harrison Street warehouse of the Board of Education, be fixed subject to the provisions of Section 151.3 of the Charter.

"The General Manager, Personnel, and members of the staff of the Civil Service Commission met with Mr. Ardzrooni and representatives of the warehouse union on Feb. 16, 1962 and discussed this matter. Although several contracts exist covering employees who work in warehousing activities, there are two contracts which include the majority of persons so employed: (1) an agreement between certain employers and the warehouse union locals 860 and 12 which contain identical rates in the various job classifications, and (2) an agreement which exists between certain employers and local 6 of the Longshoremen's union, which rates are 1 cent per hour less for each job classification. However, neither of the contracts represent a clear majority of those so employed, according to the figures obtained by the Civil Service staff up to the present time. Mr. Ardzrooni and his client have contested the figures obtained by the Civil Service Commission, which are now being re-checked.

"The position taken by Mr. Ardzrooni and representatives of Local 860 is that the one cent difference in hourly rates between the various classifications of employments within these contracts should be construed as de minimus, and for practical purposes the rates are the same, since the one cent rate differential is offset by a life insurance policy paid for by the employer in the Local 6 agreement. (*)

(*) Contract provisions of Locals 12 and 860 include a life insurance policy of $2,000. as part of Health and Welfare benefits.

"The staff disagrees with this interpretation and on March 29th submitted their report to the Civil Service Commission, recommending that the classification of J-78 Stockman not be included among those covered by Section 151.3 for salary purposes since there is no rate generally prevailing throughout the industry.

"Although Mr. Ardzrooni, in behalf of his client, had requested written notice of the time and place of the Commission hearing in this matter, through an oversight the written notice was not served, although Mr. Thomas P. White, representative of the warehousemen's union was advised by telephone that the matter was on the Civil Service Commission's calendar of March 29th. A message was left with Mr. Ardzrooni's office a day or two before the meeting, but the staff was not able to contact him personally until March 30th. Mr. Ardzrooni and Mr. White were granted a hearing before the Civil Service Commission on Thursday, April 19th, after the rates for employments subject to Charter Section 151.3 were certified and, as a result of this hearing, the Civil Service Commission ordered that the City Attorney be requested for an opinion on the following points:

> "1. Does the one cent hourly differential between the two contracts which cover the majority of those employees in a given classification satisfy the Charter requirement that there is a rate of pay generally prevailing and paid throughout the industry in this classification?
>
> "2. If the answer to question #1 is in the affirmative, does the fact that this classification was not included among the classifications of employment for which rates were certified to the Board of Supervisors by the Civil Service Commission on April 1, 1962, in compliance with Section 151.3 of the Charter, prevent the inclusion of this classification under Section 151.3 when the Civil Service Commission submits modifications in rates of pay to the Board of Supervisors for craft employments as of July 1, 1962?"

O P I N I O N

The determination of a prevailing rate of pay for the purpose of certification, pursuant to the provisions of Section 151.3 of the Charter, is a question of fact for the Civil Service Commission alone to determine. Section 151.3 of the Charter places the responsibility of making this determination upon the Civil Service Commission in the following language:

> "Notwithstanding any of the provisions of section 151 or any other provisions of this charter, whenever any groups or crafts establish a rate of pay for such groups or crafts through collective bargaining agreements with employers employing such groups or crafts, and such rate is recognized and paid throughout the industry and the establishments employing such groups or crafts in San Francisco and the civil service commission shall certify that such rate is generally prevailing for such groups or crafts in private employment in San Francisco pursuant to collective bargaining agreements, the board of supervisors shall have the power and it shall be its duty to fix such rate of pay as the compensations for such groups and crafts engaged in the city and county service." (Emphasis added)

Miller v. City and County of San Francisco, 174 C.A. 2d 109, points out that under Section 151.3 the Civil Service Commission has wide administrative powers in determining the prevailing rate of pay; that before a court will substitute its opinion for that of the Commission relative to what is the prevailing rate of pay there must be a showing of arbitrary and capricious action constituting an abuse of discretion on the part of the Commission. At page 111 of the opinion the Court states as follows:

> "The rates in question were ascertained and established by the commission pursuant to the provisions of section 151.3 of the city and county charter, which call for the exercise of a wide and sound discretion, a jurisdiction and responsibility of a high order. (Butler v. City & County of San Francisco, 104 Cal. App. 2d 126, 136 [231 P. 2d 75].)
>
> "The parties agree that the question is whether or not the commission, in fixing these rates of compensation, acted arbitrarily, whimsically and capriciously, and abused the discretion vested in it by section 151.3.

"The test to be applied, when reviewing an administrative determination of this character, has been variously stated as follows: Abuse of such administrative discretion 'must appear very clearly before the courts will interfere' (Maxwell v. Civil Service Com., 169 Cal. 336, 339 [146 P. 869]); where '"there is fair and reasonable ground for difference of opinion among intelligent and conscientious officials, the action . . . should stand . . . If the action of the commission is not palpably illegal, the court should not intervene."' (Pratt v. Rosenthal, 181 Cal. 158, 163 [183 P. 542]); civil service '"boards are vested with a high discretion and its abuse must appear very clearly before the courts will interfere"' (Nelson v. Dean, 27 Cal. 2d 873, 881 [168 P. 2d 16, 168 A.L.R. 467]); 'Judicial interference . . . is unjustified except on a showing of arbitrary, fraudulent, or capricious conduct, or a clear abuse of discretion' (Wilson v. Los Angeles County Civil Service Com., 103 Cal. App. 2d 426, 433 [229 P. 2d 406])."

From the information furnished in your request and the table attached, which is not reproduced here, you indicate that Local 12 has 395 members and Local 860 has 1600 members, all of whom are engaged in the work of warehousemen. The rate of pay provided for in the collective bargaining agreement between these two unions and their employers shows it to be uniformly one cent per hour higher than Local 6, which your table shows has 2300 to 2500 members performing this type of work. Your table also indicates that Local 241 has 875 members who are engaged in warehousemen duties at a rate different than either of the first two contracts. Additionally, you indicate three more groups at still different rates.

Since Section 151.3 became effective in 1946, the certification processes have frequently disclosed that within the private employment framework for the so-called "groups and crafts" in San Francisco, several different rates of pay would be set up in collective bargaining agreements for the identical class of employees. In such instances, it has been the long-standing and constant policy of the Civil Service Commission to certify a rate as generally prevailing only where the Commission has been able to determine that a majority of the persons so employed in private employment in San Francisco are being paid such a rate. From the facts stated in your request you indicate that you have been unable through your investigation to make such a determination in the instant case, although you have secured data on all the contracts in existence. Since you have

determined these facts in the discharge of your responsibilities under Section 151.3, it appears that under the language of Miller v. City and County of San Francisco quoted above you have not abused your discretion nor acted "arbitrarily, whimsically or capriciously" in concluding that there is no prevailing rate which you can certify to the Board of Supervisors pursuant to the language of Section 151.3 of the Charter.

The fact that the difference between two of the rates is only one cent does not render the action of the Commission arbitrary or capricious since it is based on your policy and practice to certify a prevailing rate only when you find a majority of the persons engaged in the work being paid that rate, and in this case you have not been able to find such a majority.

The determination of what constitutes a prevailing rate is not always possible of definition for all time and place. In Metropolitan Water Co. v. Whitsett, 215 Cal. 400, the Supreme Court pointed out the great difficulty there is in defining a prevailing wage. At page 414 of the opinion is the following language:

> "But, say counsel, what is a prevailing wage? No court has attempted, and properly so, to fix one in a definite amount. Precise definition of the term for all time and place is impossible. The Supreme Court of the United States has pointed out the difficulties of definition and held it too indefinite in a criminal prosecution. Other courts have indicated perhaps a workable definition as a matter of business administration. Its definition is relative to time and place, both of which are within the purview and cognizance of the administrative board in each case. . ."

The policy and practice which you have adopted as your test or formula for the existence of a prevailing rate of pay passes the test of reasonableness. That being so, a court would not intervene to substitute views which others may believe to be as or more reasonable under the circumstances of this case. Appellate decisions of the courts of California confirm that certification under Section 151.3 of the Charter is a matter exclusively within the "purview and cognizance" of the Civil Service Commission.

The employees' representatives argue that the one cent differential between the two principal contracts should be disregarded since it is used to purchase insurance for the

employees who are covered by the lower rate (Local 6). According to your request you have ascertained that the members of Locals 12 and 860 also have provision in their contracts under the health and welfare sections thereof for the employer to purchase life insurance for the employees covered. Consequently, it is assumed that you determined that the existence of the insurance in both the contracts negated the argument made by the employees' representatives that the differential of one cent should be disregarded and that you should consider these two rates as one rate.

You are therefore advised that the decision of the Civil Service Commission not to include J-78 Stockman in those classes covered by Section 151.3, for the reasons which you have stated is a valid and legal determination under the powers delegated in the Charter to the Civil Service Commission.

Respectfully submitted,

THOMAS M. O'CONNOR
City Attorney

TO: Mr. George J. Grubb
General Manager, Personnel
Civil Service Commission
151 City Hall
San Francisco 2

BJW/RJR

OPINION NO. 62-30

June 18, 1962

SUBJECT: WHETHER NORTH AMERICAN PHILLIPS CO. EQUIPMENT MADE IN THE NETHERLANDS MAY BE ACCEPTED UNDER CITY CONTRACT DESPITE CALIFORNIA "BUY AMERICAN" STATUTE IN VIEW OF CERTAIN TREATIES BETWEEN U.S.A. AND THE NETHERLANDS (JOB NO.1955-R-22; SOUND SYSTEM FOR CIVIC CENTER AUDITORIUM)

Dear Sir:

Your request for opinion is as follows:

REQUEST

"Reference is made to the attached copy of a letter on the above subject dated May 11, 1962 from Mr. Girvan Peck of the Law Offices of Morrison, Foerster, Holloway, Shuman & Clark.

"Mr. Peck, who represents the Langevin Co., distributor of sound systems for the North American Phillips Co., wishes to know if Phillips Co. equipment that is made in The Netherlands may be accepted under a City contract, despite Government Code Sections 4301 and 4305 in view of certain treaties between the United States and The Netherlands.

"As I propose to call for bids in the near future for a sound system to be installed in the Civic Auditorium and as Phillips equipment is suitable for our purpose and is admissible under our specifications, it is in the City's interest, if this equipment may be accepted, to have assurance to this effect prior to receipt of bids in the expectation that the competitive field will thus be widened.

"I therefore request your opinion with respect to the acceptability of North American Phillips Co. equipment that is manufactured in The Netherlands."

The letter from Mr. Peck which you attach reads in part as follows:

"As you know, The Langevin Co., distributor here for the North American Phillips Co., which I represent, is interested in bidding on the subject contract. Some of the Phillips equipment which it would expect to supply is made in The Netherlands, and accordingly the question arises whether its bid would comply with the provisions of Article 16 of the plans and specifications, which incorporate the

'buy American' provisions of the Government Code. I understand that you as well as we would like a decision of the question.

"Accordingly, I request that you ask the opinion of the City Attorney as to whether the provisions of Title 1, Division 5, Chapter 4, Article 1, of the Government Code, being Sections 4301 through 4305, are applicable to products made in The Netherlands, in view of the treaties between the United States and The Netherlands. In this connection I refer to the General Agreement on Tariffs and Trade of October 30, 1947, appearing in 61 Stat., Part 5, and also Treaty of Friendship, Commerce and Navigation between the United States and The Netherlands, executed on March 27, 1956."

O P I N I O N

Equipment of North American Phillips Co. manufactured in The Netherlands is acceptable notwithstanding Government Code §§ 4300 through 4305, and a contract with The Langevin Co. will not be invalidated thereby.

Government Code §§ 4300 through 4305 are a codification of a statute enacted in 1933. (St. 1933, p. 732.)

Government Code §4304 states that "Every contract for the construction, alteration or repair of public works or for the purchase of materials for public use shall contain a provision that only unmanufactured materials produced in the United States, and only manufactured materials manufactured in the United States, substantially all from materials produced in the United States, shall be used in the performance of the contract."

Government Code §§ 4300-4305 apply to the City and County of San Francisco. (See:Charter § 3; San Francisco Administrative Code §6.31.)

Clause 2 of Article VI of the United States Constitution states that "all treaties made, or which shall be made, under the authority of the United States shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

Section 3 of Article I of the California Constitution states that "The State of California is an inseparable part of the American Union, and the Constitution of the United States is the supreme law of the land."

Hence treaties at variance with Government Code §§ 4300-4305 prevail over those sections. (34 Ops. Cal. Atty. Gen.302,304; City Attorney's Op. No. 1589-A, dated December 29, 1961.)

The United States and The Netherlands are parties to The General Agreement on Tariffs and Trade (commonly referred to as GATT) dated October 30, 1947. (61 Stat., part 5, p. A 11, as amended.) Paragraph 4 (formerly paragraph 2) of Article III of Part II thereof provides:

> "The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution, or use." (62 Stat., part 3, p. 3681; 61 Stat., part 5, p.A 18.)

Products made in The Netherlands would be accorded less favorable treatment than those made in the United States were Government Code §§4300-4305 held to be controlling.

Paragraph 12 of Article XXIV of Part III of GATT reads:

> "Each contracting party shall take such reasonable measures as may be available to it to ensure observance of the provisions of this agreement by the regional and local governments and authorities within its territory." (62 Stat., Part 2, p. 2016.)

Paragraph 8(a) (formerly paragraph 5) of Article III of Part II contains an exception which reads:

> "The provisions of this Article shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale." (62 Stat., Part 3, p. 3081; 61 Stat., Part 5, p. A 19.)

In 34 Ops. Cal. Atty. Gen. 302 the Attorney General on December 24, 1959, ruled that Government Code §§ 4300 through 4305 did not invalidate a contract between the Department of Water and Power of the City of Los Angeles and a Swiss corporation for the purchase of two turbine generator units manufactured by foreign labor from foreign materials. That opinion is in part based on paragraph 2 (now paragraph 4) of Article III of Part II of GATT. The Attorney General ruled that the purchase did not fall within the exception in paragraph 5 (now paragraph 8(a)) because the turbine generator units were for use in production of goods for sale, namely, electricity.

City Attorney's Opinion No. 1589-A dated December 29, 1961, is to like effect.

Neither opinion had occasion to consider whether the purchases there under consideration were for "governmental purposes."

There are two requisites to the application of the exception contained in paragraph 8(a):

> 1. The products must be purchased for governmental purposes; and
>
> 2. The products must not be purchased with a view to commercial resale or with a view to use in the production of goods for commercial sale.

In the case of the purchase of sound equipment for the Civic Auditorium the second requisite is met but the first is not because the sound system will not be purchased for "governmental purposes." Purchases by regional and local governments for non-governmental purposes are governed by GATT. (Paragraph 12 of Article XXIV of Part III.)

The powers of a municipal corporation are denominated governmental on the one hand, and proprietary on the other. (Chafor v. City of Long Beach, 174 Cal. 478, 483-486; Rhodes v. City of Palo Alto, 100 C.A. 2d 336, 339.)

A municipal corporation constructs and maintains a civic auditorium not for governmental purposes, but in its proprietary capacity. (Chafor v. City of Long Beach, supra, 174 Cal. at pp. 488-490; Sanders v. City of Long Beach, 54 Cal. App. 2d 651; Rhodes v. City of Palo Alto, 100 C.A. 2d 336.)

Therefore paragraph 4, rather than the exception contained in paragraph 8 (a) of Article III of Part II of GATT, applies.

In addition to GATT the United States and The Netherlands are parties to a Treaty of Friendship, Commerce and Navigation signed at The Hague March 27, 1956. Article XVI, paragraph 1, of that treaty provides:

> "Products of either Party shall be accorded, within the territories of the other Party, national treatment and most-favored-nation treatment in all matters affecting internal taxation, sale, distribution, storage and use."

Article XVII, paragraph 1, thereof provides:

> "Each Party undertakes (a) that enterprises owned or controlled by its Government, and that monopolies or agencies granted exclusive or special privileges within its territories, shall make their purchases and sales involving either imports or exports affecting the commerce of the other Party solely in accordance with commercial considerations, including price, quality, availability, marketability, transportation and other conditions of purchase or sale; and (b) that the nationals, companies and commerce of such other Party shall be afforded adequate opportunity, in accordance with customary business practice, to compete for participation in such purchases and sales."

In City Attorney's Opinion No. 1589-A, dated December 29, 1961, it was pointed out that identical provisions in a treaty with Japan dated April 2, 1953, superseded the "Buy American" provisions of Government Code §§ 4300-4305.

Paragraph 4 of Article XXII of the treaty with The Netherlands provides in part:

> "The provisions of the present Treaty relating to the treatment of goods shall not preclude action by either Party which is required or specifically permitted under the General Agreement on Tariffs and Trade during such time as such Party is a contracting party to the General Agreement."

No provision of GATT specifically permits, much less requires, discriminatory action such as that contemplated by Government Code §§ 4300-4305. Hence the general principles expressed in Articles XVI and XVII apply, rather than the exception contained in paragraph 4 of Article XXII.

You are therefore advised that the above treaties supersede Government Code §§ 4300-4305 and prevent those sections from rendering unacceptable the sound equipment of North American Phillips Co. manufactured in The Netherlands.

Respectfully submitted,

THOMAS M. O'CONNOR
City Attorney

TO: Mr. Reuben H. Owens
Director of Public Works
260 City Hall
San Francisco 2, California

GEB/RJR

OPINION NO. 62-31

June 20, 1962

SUBJECT: BUILDING PERMITS, APPROVAL OF GRANTING SAME BY CITY DEPARTMENTS IN A PROPOSED SUBDIVISION

Dear Sir:

Your request for an opinion is as follows:

REQUEST

"I will greatly appreciate receiving your opinion on whether or not city departments may approve the granting of a building permit in a proposed subdivision after the tentative map has received the required approval of all city departments concerned."

OPINION

My predecessor, Dion R. Holm, had the question proposed by you presented to him by the City Planning Commission in 1950. In Opinion No. 280, dated November 14, 1950, in answer to that question he advised the Planning Commission that no building permit to construct premises in a proposed subdivision should be approved where the subdivision final map or record of survey map has not been finally approved or established by the Board of Supervisors.

Since 1950 there has been no substantial change in the law relating to subdivision maps (Business and Professions Code Section 11500-11640; Ordinance No. 2250 [1939]) other than the repeal of sections 11505, 11575 and 11576 thereof relating to the definition, filing and certification of a record of survey map in lieu of a final map and an amendment to section 11538 thereof to extend the prohibition against the sale of a subdivision in whole or in part to include the lease of a subdivision or any part thereof. Ordinance No. 2250 [1939] is now codified in the Administrative Code, Sections 26.1-26.5.

In view of the fact that there has been no substantial change in the law relating to subdivision maps, other than to make it more restrictive, I concur in the conclusion reached by my predecessor in Opinion No. 280, supra, and in answer to your request, it is my opinion, and you are advised, that city departments may not approve the granting of a building permit in a proposed subdivision after the tentative map has received the required approval of all city departments concerned and before

the final map has been approved by the Board of Supervisors.

Respectfully submitted,

THOMAS M. O'CONNOR
City Attorney

TO: Mr. Sherman P. Duckel
Chief Administrative Officer
289 City Hall
San Francisco 2, California

JJS/GEB

OPINION NO. 62-32

JUNE 25, 1962

SUBJECT: LEGALITY OF LOCAL LEGISLATION ALLOWING PERCENTAGE PREFERENCES TO LOCAL FIRMS IN AWARDING PUBLIC WORK CONTRACTS AND IN PURCHASING SUPPLIES.

Dear Sir:

Your request for an opinion is as follows:

R E Q U E S T

"A number of San Francisco business firms have registered protests with various city officials, including the writer, against the award of City and County of San Francisco contracts to bidders whose bids are predicated in whole or part on the furnishing of materials originating in countries other than the United States of America.

"Section 98 of our Charter provides in part that the Board of Supervisors may by ordinance provide that as to any contract for any public work or improvement or for the purchase of materials which are to be manufactured, fabricated or assembled for any public work or improvement, a preference in price not to exceed ten per cent shall be allowed in favor of such materials as are to be manufactured, fabricated or assembled within the City and County of San Francisco as against similar materials which may be manufactured, fabricated or assembled outside thereof. Additional relevant text is contained in said Charter section.

"My attention has also been directed to Section 4334 of the Government Code of the State of California which declares in effect that public officers and bodies charged with the letting of contracts for public work and supplies, may give such contracts to persons manufacturing the supplies in the State of California if the bids of such persons do not exceed by more than five per cent the lowest bids quoted by persons manufacturing the supplies outside the State. Said section also contains other pertinent exceptions applicable to otherwise low bidders.

"Will you please advise me what, if any, legislative action may be taken by our Board of Supervisors for the purpose of assuring that a preference will be given to San Francisco and United States firms with respect to contracts awarded by the City and County for public purposes. I have in mind that a ten per cent differential in favor of San Francisco concerns, and a six per cent differential in favor of other American firms, as opposed to bidders contemplating the use of foreign materials, would be reasonable protection for local and domestic business people."

O P I N I O N

The portion of Section 98 of the City Charter most applicable to the problem you raise provides as follows:

"The board of supervisors shall have full power and authority to enact all necessary ordinances to carry out the terms of this section and may by ordinance provide that any contract for any public work or improvement, or for the purchase of materials which are to be manufactured, fabricated or assembled for any public work or improvement, a preference in price not to exceed ten per cent shall be allowed in favor of such materials as are to be manufactured, fabricated or assembled within the City and County of San Francisco as against similar materials which may be manufactured, fabricated or assembled outside thereof. When any such materials are to be fabricated, assembled or manufactured by any subcontractor or materialman for the purpose of supplying the same to any contractor bidding on or performing any contract for any public work or improvement, said sub-contractor or materialman manufacturing, fabricating, assembling or furnishing said materials manufactured, assembled or fabricated within the City and County of San Francisco shall be entitled to the same preferential as would any original contractor or materialman furnishing the same if the board of supervisors by ordinance so provide. When any ordinance shall so provide any officer, board or commission letting any contract may in determining the lowest responsible bidder for the doing or performing of any public work or improvement add to said bid or sub-bid an amount sufficient not exceeding ten per cent in order to give preference to materials manufactured, fabricated or assembled within the City and County of San Francisco."

Chapters 6 and 21 of the San Francisco Administrative Code deal respectively with contract and purchasing procedures and provide that all the terms and provisions of Section 98 of the Charter be made a part of all contracts entered into pursuant to those chapters. (See Sections 6.33 and 21.26.) The above-quoted portion of Section 98, however, does not allow local preferences in a final sense but merely leaves it to the Board of Supervisors to legislate the allowance of such preferences "not to exceed ten per cent" if it so desires. While Sections 6.33 and 21.26 of said Administrative Code are unquestionably mandatory as to the positive provisions of Section 98 of the Charter, namely, those pertaining to working requirements, they are not definitive enough to include the yet unexercised discretion vested in the Board of Supervisors regarding the allowance of price preferences.

It will, therefore, take additional action by ordinance on the part of the Board of Supervisors, if it deems the same necessary and advisable, to empower the city officials contracting on its behalf to exercise award preferences percentage-wise in favor of local contractors or bidders within the discretionary limits imposed by Section 98. The validity of such legislation depends upon the showing of a reasonable basis for awarding the preference to local contractors or bidders as against other contractors or bidders. (See Schrey v. Allison Steel Manufacturing Co., 255 Pac. 2d 604, where a five per cent preference law of Arizona in favor of state and local taxpaying contractors was upheld as constitutional.)

As you pointed out in your request, a price preference for qualified state concerns bidding on public contracts and public purchases of supplies has already been legislated upon by the State Legislature. Such legislation makes it discretionary with public officials awarding public contracts and making public purchases of supplies to make award preferences not to exceed five per cent in favor of state manufacturers over outside manufacturers within the meaning of the act. Section 4334 of the Government Code provides as follows:

> "§4334. Letting contracts to, and purchasing supplies from, persons manufacturing supplies in State: Conditions. Public officers and bodies charged with the letting of contracts for public work, with the construction of public bridges, buildings and other structures, or with the purchase of supplies for any public use may give such contracts and purchase such supplies from persons manufacturing in the State the supplies to be used pursuant to contract or the supplies to be purchased if:
>
> (a) The bids of such persons, or the prices quoted by them, do not exceed by more than 5 per cent

the lowest bids or prices quoted by persons manufacturing the supplies outside the State.

(b) The major portion of the work of manufacturing the supplies is not done outside the State.

(c) In the opinion of the public officers or bodies, the public good will be served thereby."

Other pertinent sections of the Government Code are Sections 4300 through 4305 thereof, which are known as the "Buy American" statutes of our state government. The crux of their provisions is stated in Section 4304 as follows:

"§4304. Provision that only materials produced and manufactured in United States shall be used.

[Contract to contain provision.] Every contract for the construction, alteration or repair of public works or for the purchase of materials for public use shall contain a provision that only unmanufactured materials produced in the United States, and only manufactured materials manufactured in the United States, substantially all from materials produced in the United States shall be used in the performance of the contract.

[Noncomplying person not to be awarded contract.] Any person who fails to comply with such provision shall not be awarded any contract to which this article applies for a period of three years from the date of the violation."

These Government Code sections apply to the City and County of San Francisco. (See Section 3, Charter; Section 6.31, San Francisco Administrative Code; City Attorney Opinion No. 62-30, issued June 18, 1962) However, the applicability of Section 4334 of the Government Code is purely upon a discretionary rather than a mandatory basis.

It should also be noted that the state law does not expressly prohibit local communities from legislating price preferences in favor of their local business concerns as distinguished from state business concerns, and it is upon that basis that I believe a local preference statute may legally be enacted, if deemed advisable, within the discretion of the Board of Supervisors.

It should be pointed out, however, that to the extent either local statutes or the state statutes involve conflict with prohibitions against preferences of this kind appearing in the treaties or other international agreements of the United

States with other nations, they must be considered as voidable and unenforceable. (See United States v. Belmont, 301 U.S. 324, 331, 332) This is so because such international compacts are given superseding power over state and local laws under the terms of Article VI, Clause 2, of the Federal Constitution.

Such treaties and compacts now in existence are so numerous that a full discussion of them in this opinion is not feasible. To illustrate, the multilateral General Agreement on Tariffs and Trade entered into between the United States and many other signatory nations on October 30, 1947 (61 Statute, Part 5), as amended since then, now provides in paragraph 4 of Part II, Article III, as follows:

> "The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.***"

However, paragraph 8 (a) of said Article III, Part II, provides for an exception, as follows:

> "The provisions of this Article shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to use in the production of goods for commercial sale."

Said exception is a significant one inasmuch as many city and county contracts do relate to governmental purposes, such as the construction or repair of public streets or buildings or the purchase of automobiles and of office supplies and equipment for certain departments wholly governmental in character. To such extent, the city is now free to prefer local interests within the meaning of the preferences of the aforestated local and state law. However, in those categories in which international agreements of the United States place the sale or distribution of foreign-made goods or articles on equal footing with home-made products, no local law can take precedence over them. It is presumed that such agreements are designed to subserve a larger overall interest than locally restrictive laws. This was made plain in the case of Bocardi Corporation of America v. Domenech, 311 U.S. 149, 166, 85 L. Ed. 98, wherein the validity of legislation of Puerto Rico prohibiting the use of foreign trade marks, brands or trade names

on distilled spirits manufactured in Puerto Rico, contrary to a treaty obligation of the United States, was rejected by the Supreme Court as follows:

> "The exigencies of local trade and manufacture which prompted the enactment of the statute cannot save it, as the United States in exercising its treaty making power dominates local policy."

In accordance with the foregoing, you are therefore advised that, in my opinion, local preference legislation not to exceed ten per cent may be enacted by the Board of Supervisors, if deemed advisable, pursuant to Section 98 of the Charter; that the five per cent state law governing state as distinguished from local bidders on public work or supply purchasing contracts is already applicable within its discretion to the City and County of San Francisco and is not jurisdictionally subject to change by the Board of Supervisors; and that the award or price preference provisions of the state law as well as those of any local law that the Board of Supervisors may enact can be of no force and effect to the extent they involve conflict with the binding international treaties and agreements entered into by the United States.

Respectfully submitted,

THOMAS M. O'CONNOR
City Attorney

TO: William C. Blake, Supervisor
235 City Hall
San Francisco 2

RJR/WFB

OPINION NO. 62-33

June 26, 1962

SUBJECT: ELECTIONS; HOUSING; PROCEDURE TO BE FOLLOWED TO PERMIT QUALIFIED ELECTORS TO VOTE ON LOW RENT HOUSING PROJECTS

Dear Sir:

Your request for an opinion is as follows:

REQUEST

"I have received an inquiry as to the procedure to be followed in order to permit the qualified electors of the City and County to vote on the development, construction, or acquisition of a low rent housing project (or projects).

"Article 34 of the State Constitution, requiring voter's approval of such projects, was adopted by the voters on November 7, 1950. However, this Article authorizes further legislation to facilitate its application.

"Since I do not have knowledge of this legislation, if any, or any further determinations that may have been made on the application of this Constitutional provision, I request that you advise me the proper procedure to place such a proposal on the ballot."

OPINION

The Constitution of the State of California was amended at the general election of November 7, 1950, to provide that "no low rent housing project shall hereafter be developed, constructed, or acquired in any manner by an state public body until, a majority of the qualified electors of the city, town or county, as the case may be, in which it is proposed to develop, construct or acquire the same, voting upon such issue, approve such project by voting in favor thereof at an election to be held for that purpose, or at any general or special election." (Section 1, Article XXXIV, Calif. Const.)

The aforesaid constitutional change, essentially providing for the determination of future policy in the important matter of low housing projects on a community basis by local electors, was presented as the result of initiative petition following upon decision of the California Supreme Court that resolutions of city councils and other legislative bodies which established low rent housing projects were not subject to the power of referendum as they were not legislative

in character. (Housing Authority v. Superior Court, 35 Cal. 2d 550, 557, 219 P. 2d 457.) It had been decided earlier that San Francisco's adoption of a resolution authorizing its entry into a municipal cooperation agreement with the housing authority was an administrative act so as not to fall within the purview of its charter mandate that "every legislative act shall be by ordinance." (Kleiber v. City and County of San Francisco, 18 Cal. 2d 718, 117 P. 2d 657; Section 13, Charter.)

Legislation not in conflict with its provisions, but designed to facilitate its operation, is expressly authorized by the article under discussion. However, no such procedural legislation has been enacted, and the constitutional provisions are therein declared to be self-executing. (Sections 1 and 2, Article XXXIV, Const.) The article, then, is to be given reasonable effect without the aid of implementing legislation, but through the utilization of existing laws to supply necessary rules and details. (Winchester v. Howard, 136 Cal. 432, 440-441, 64 P. 692, 69 P. 77; 18 Ops. Cal. Atty. Gen. 103, 108.)

An existing law, applicable to Article XXXIV elections to be held in San Francisco, is the charter itself, section 174 thereof providing in part as follows:

> "Special municipal elections shall be called by the registrar when required by this charter on the filing of appropriate initiative, referendum or recall petitions, as provided by this charter, and may be called by the supervisors for bond issues, declarations of policy, or for the voting on candidates for city and county offices not subject to election at general municipal elections.
>
> "All provisions of the general laws of this state, including penal laws, respecting . . . elections . . . shall be applicable to the city and county, except as otherwise provided by this charter or by ordinance adopted by the board of supervisors as authorized by this charter relative to any rights, powers or duties of the city and county or its officers."

In short, the charter first specifies certain elections which are required to be called by the Registrar of Voters and others which may be called by the Board of Supervisors, additionally adopting state law with respect to those elections it has not enumerated.

It will be noted that charter section 174 has the effect of insuring control by the Board of Supervisors over the matter of calling, as distinguished from conducting, those elections in which discretion is contemplated to be exercised in the call itself.

Prior to adoption of the present charter, some legal question existed as to whether the Board of Election Commissioners, whose powers are now exercised by the Registrar of Voters, or the Board of Supervisors had jurisdiction to call elections. (See People v. Hoge, 55 Cal. 612.)

There is a clear distinction between calling an election, including the giving of notice thereof, and holding an election, which distinction is recognized throughout the California Elections Code. The "holding of elections" embraces such acts as, for example, the opening of the polls on the election day, the casting of the ballots, the challenging of voters, and the canvssing of the vote, all of which follow the calling of the election. (Imperial County v. Garey, 61 Cal. App. 439, 443, 215 P. 89.) Since 1932, these concepts have received individual legislative treatment in sections 173 and 174 of the San Francisco Charter, the former reposing all administrative functions connected with the holding of elections in the Registrar of Voters, and the latter, together with general law, governing calls for elections.

Provisions respecting elections in cities, including a city and county, are found in Part 2 of Division 12 of the Elections Code commencing at section 22600. Section 22601 of that part provides as follows:

> "Section 22601. Scope of Part. The provisions of this part shall apply to all municipal elections except where otherwise provided for in the Constitution of the State or in a charter duly adopted or amended pursuant to the Constitution of this State."

Thus, general law governs the proper procedure to be followed to permit the qualified electors of the City and County of San Francisco to vote on the development, construction, or acquisition of additional low rent housing projects, the applicable provision thereof being Section 22807 of the Elections Code, as follows:

> "Section 22807. Submission of proposition at regular or special elections. A proposition may be submitted at a regular election, or a special election may be called, by ordinance or resolution, for the purpose of voting on a proposition."

Accordingly, my opinion is that it is a function of the Board of Supervisors to call elections contemplated in Article XXXIV

of the California Constitution and that all matters with respect to the holding of such elections are within the jurisdiction of the Registrar of Voters.

You are so advised.

Respectfully submitted,

THOMAS M. O'CONNOR
City Attorney

TO: Mr. Charles A. Rogers
Registrar of Voters
167 City Hall
San Francisco 2, California

OIW/TJB

OPINION NO. 62-34

June 27, 1962

SUBJECT: JAPANESE CULTURAL CENTER GARAGE--PAYMENT TO NONPROFIT CORPORATION IN CONSIDERATION OF CONVEYANCE OF TITLE TO LAND AND IMPROVEMENTS NOT GIFT OF PUBLIC FUNDS; A SUM PAYABLE AS A CONTINGENCY IS NOT A DEBT UNTIL THE CONTINGENCY HAS HAPPENED

Dear Sir:

Your request for an opinion is as follows:

REQUEST

"At the Finance Committee meeting of June 20, 1962, information was presented that the City's Property Department has appraised land proposed to be occupied by the Japanese Cultural Center Garage at $285,000. However, the National Braemar Company, developer of the Cultural Center, proposes to sell rights to this property below certain datum to the non-profit corporation, which will construct the garage, for a sum established at $1,100,000, while retaining rights to areas above this datum for the construction of other facilities thereon.

"The Committee requests your opinion as to whether this transaction, i.e. payment to National Braemar Company of a sum in excess of the amount of the appraisal by the City's property experts, could be construed as a gift of public funds. Further, your opinion is requested as to whether or not the City is in a position to accept a gift of the garage facility in the circumstances under which it is offered."

The material facts upon which your request is based are as follows:

The City of San Francisco Western Addition Parking Corporation, hereinafter referred to as the Corporation, in its letter of March 23, 1962, has proposed to purchase the garage site from National Braemar, Inc., developer of the Japanese Cultural Center, for the sum of $1,100,000 to construct thereon a public garage with an approximate capacity of 865 parking stalls beneath said cultural center at an additional cost of $3,242,250 including $2,945,000 direct construction costs, and to convey said land comprising the garage site and the garage structure to the

City in consideration of the City's agreeing to pay either (1) up to a maximum of $75,000 per year for a period of 28 years, or (2) the balance necessary to meet annual debt service requirements after payment by the developer of $60,000 per year for a period of 28 years, both alternatives being contingent upon the net revenues of the garage being insufficient to meet the annual debt service on the Corporation's bonds issued to finance the cost of acquisition of the garage site and construction of the garage. Such payments would be made solely from a special fund legally available for such purposes and not from the City's general fund.

OPINION

The public off-street parking facility which the City will acquire by the proposed transaction is a public purpose for which public money may be expended. (Larsen v. City and County of San Francisco, 152 C.A. 2d 355, 361; see also Sts. & H.C.A., Sec. 32, 501.)

You state that the Director of Property has appraised land proposed to be occupied by the Japanese Cultural Center Garage at $285,000 and that the developer proposes to sell the property to the Corporation for a sum established at $1,100,000. The fact that there is a great disparity between these two sums does not, as a legal matter, prevent the City from entering into an arrangement whereby title to both the property and the garage to be constructed thereon will vest in the City upon execution of an agreement with Corporation providing for certain contingent payments by the City. There may be circumstances where, in the exercise of a reasonable discretion and acting in the public interest, the Board of Supervisors may choose not to abide by the maximum price of such appraisal. Mere disparity of consideration is not sufficient to render a contract for the purchase of property invalid unless the inadequacy is such as to raise a presumption of constructive fraud.

In my opinion, under all the circumstances presented, there is not such a disparity of consideration as to raise such a presumption as a matter of law. The wisdom and propriety of entering into such an agreement, and whether or not under the circumstances the Board believes it is a provident agreement, are matters within the sound discretion of the Board and if in the exercise of such discretion the Board should approve such an agreement, this would not in my opinion constitute a gift a public funds.

In answer to the second question, inasmuch as the offer of the Corporation is based on the City's agreeing to make certain contingent payments, said offer does not constitute the offer of a gift of the garage facility as stated in the request. Notwithstanding this conclusion, however, the question remains whether the City can legally accept the offer made by the nonprofit corporation.

Section 18 of Article XI of the State Constitution provides in part as follows:

> "No county [or] city. . .shall incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the qualified electors thereof, voting at an election to be held for that purpose, nor unless before or at the time of incurring such indebtedness provision shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also provision to constitute a sinking fund for the payment of the principal thereof, on or before maturity, which shall not exceed 40 years from the time of contracting the same. . . ."

Section 86 of our Charter provides in part as follows:

> "No ordinance or resolution for the expenditure of money, except the annual appropriation ordinance, shall be passed by the board of supervisors unless the controller first certify to such board that there is a sufficient unencumbered balance in a fund that may legally be used for such proposed expenditure, and that, in the judgment of the controller, revenues as anticipated in the appropriation ordinance for such fiscal year and properly applicable to meet such proposed expenditure will be available in the treasury in sufficient amount to meet the same as it becomes due.
>
> "No obligation involving the expenditure of money shall be incurred or authorized by any officer, employee, board or commission of the city and county unless the controller first certify that there is a valid appropriation from which the expenditure may be made, and that sufficient unencumbered funds are available

in the treasury to the credit of such appropriation to pay the amount of such expenditure when it becomes due and payable.

"Every officer who shall approve, allow or pay any demand on the treasury not authorized by law, ordinance or this charter, shall be liable to the city and county individually and on his official bond for the amount of the demand so illegally approved, allowed or paid.

* * *

"All obligations incurred, all ordinances passed, and resolutions and orders adopted, contrary to the provision of this section, shall be void and any claim or demand against the city and county based thereon shall be invalid."

The second question, therefore, may be framed as follows: Does the City's agreement to pay up to $75,000 per year for a period of twenty-eight years, contingent upon net revenues from the operation of the public garage being insufficient to meet the Corporation's annual debt service, constitute the incurring of an indebtedness or a liability by the City in excess of the income or revenue for the year requiring approval of two-thirds of the electorate under Section 18 of Article XI of the State Constitution or the incurring of an obligation in excess of funds available in violation of Section 86 of our Charter? The answer is no.

In Doland v. Clark, 143 Cal. 176, a similar question arose. In that case it was contended that a certain contract by the City of Sacramento violated Section 18 of Article XI of the Constitution of the State and Section 25 of the city charter, which provided, "In no case shall a liability be created, or a warrant drawn against any fund beyond the actual amount of any money existing in the fund wherewith to meet the same." The Supreme Court in holding the contracts valid said:

". . . The monthly rental under both contracts was six hundred and ninety dollars. This amount would not become due until the appellant had performed his contracts and put the systems contemplated by the contracts in operation. The amounts to become due on completion of the contracts by appellant might never become a liability upon the city. A sum payable upon a contingency is not a debt, nor does it become

> a debt until the contingency happens. (People v. Arguello, 37 Cal. 525.) We might therefore rest this decision upon the ground that the law presumes all contracts to be fair, reasonable, and to be made by proper authority. In order for these contracts to appear void under the constitution it must appear that an indebtedness or liability has been incurred for some year exceeding the income and revenue provided for such year. In order for them to be void under the charter it must appear that a liability has been created against a fund in excess of the amount of money existing in the fund. Neither proposition appears here."

The aforesaid conclusion by the Supreme Court is equally applicable to the facts herein presented both under Section 18 of Article XI of the Constitution and Section 86 of our Charter. (See also American Co. v. City of Lakeport, 220 Cal. 543; City of Oakland v. Williams, 15 Cal. 2d 542; and San Francisco v. Boyd, 17 Cal. 2d 606.)

Furthermore, since the contingent liability of the City under the proposed agreement is payable solely from a special fund which must be legally available for such payment and not from the general fund, under the "special fund doctrine" the agreement would not be violative of either of the aforesaid constitutional or charter provisions.

Based on the foregoing, I conclude that the City may legally accept the offer of the Corporation.

You are advised accordingly.

Respectfully submitted,

THOMAS M. O'CONNOR
City Attorney

TO: Robert J. Dolan
Clerk of the Board
235 City Hall
San Francisco

JC/TJB

LETTER OPINIONS

January 31, 1962

Mr. Belford Brown, Manager
San Francisco International Airport
San Francisco 28, California

Subject: Liability for repair of windows and frames, in Interstate Hosts, Inc. premises at San Francisco International Airport Terminal Building.

Dear Mr. Brown:

Reference is made to your letters of December 29, 1961 and January 24, 1962 and to the letters of Interstate Hosts, Inc. of December 26, 1961 and January 22, 1962 regarding the subject matter and by your letters requesting a legal decision on the question involved.

A review of the lease indicates that Interstate is the lessee of the entire third floor as well as other parts of the Terminal Building. The lease contains no provision requiring the lessor to make any repairs. The lease contains the following provisions relevant to the question which are quoted in part or entirety for convenience in reference as follows:

Section 6.

" .... Lessee agrees to keep the premises designated herein, and all fixtures and equipment, clean, neat, safe, sanitary and in good order at all times."

Section 7.

" .... Lessee agrees that the several businesses conducted under this agreement will be operated in strict compliance with all the laws of the United States, the State of California, applicable laws of the City and County of San Francisco, applicable laws of the County of San Mateo or of any legal authority having jurisdiction, and all the rules

and regulations issued pursuant to the laws of the sovereignties or agencies hereinabove mentioned."

Section 9.

" .... It is understood and agreed that the obligation of City is restricted to turning over to Lessee the walls, floors and ceilings, as indicated on Exhibits 1 to 15 inclusive, of the respective demised premises in a structurally complete but still unfinished and undeveloped state."

Section 13.

" .... Lessee agrees to keep the demised premises, at its own expense, in good repair and condition. Lessee agrees that, if it becomes reasonably necessary during the term of this agreement, it will, at its own expense, redecorate and paint the interior of the demised premises and replace worn carpeting, curtains, drapes or other furnishings, from time to time, as their condition may require."

Section 15.

" .... No janitorial or window washing services will be supplied by City."

Section 19.

" .... Lessee agrees that it will maintain in force, at its own expense, during the term of this lease or of any extension thereof, insurance relating to the properties of Lessee in the demised premises, and all renewals or replacements of the same, against fire, damage caused by acts of vandalism or malicious mischief, damage from aircraft, window or other structural glass breakage in the demised premises, and against other losses or damage embraced in the extended coverage clause customarily issued by insurance companies operating in San Francisco. Such policies are to be with insurance

companies approved by the Controller of the City and County of San Francisco and in such form satisfactory to the City Attorney of the City and County of San Francisco and in amounts satisfactory to Commission. Lessee agrees that if such property is damaged or destroyed by fire or from any other cause, said damage shall be promptly repaired, or new equipment, to be approved by Commission, shall be promptly substituted therefor, all at the cost and expense of Lessee. Any necessary reconstruction, if substantial in extent, shall be subject to the terms of Section 9 hereinabove."

Section 34.

" .... Lessee agrees to yield and deliver to City possession of the premises herein demised, at the termination of this agreement by expiration without extension of term or as otherwise herein provided, in good condition and in accordance with the express obligations hereunder, except for reasonable wear and tear."

Following is a brief opinion citing relevant cases to the question as to liability between landlord and tenant for repair of said windows, casings and frames.

Polack v. Pioche, 35 Cal. 416-(1868) was an action involving a covenant to repair and the Court held that a general covenant to repair is binding upon the tenant under all circumstances unless the tenant desires to relieve himself from liabilities by excepting them from the operation of his covenant.

Realty & Rebuilding Co. v. Rea, 184 Cal. 565 - (1920) In interpreting whether a covenant to repair included restoration or replacement of the demised premises which had been destroyed by fire, the Court held that:

"The extent of the liability of the lessees in respect to the damages in question is therefore dependent entirely upon the interpretation of the terms 'repair' and 'keep in repair.' These terms

are not technical, nor is there anything to indicate that they were used in any technical or special sense or in accordance with any special usage. A general covenant to repair on the part of the tenant is, as stated in Polack v. Pioche, supra, binding unless limited by express exception, but such a covenant, even if it be in the most general terms, does not constitute an agreement to rebuild unless the term 'repair' means also to replace. It has no such meaning in its normal sense. To repair means to mend an old thing, not to make a new thing; to restore to a sound state something which has become partially dilapidated, not to create something which has no existence."

Leominster Fuel Co. v. Scanlon, 137 N.E. 271 Mass. (1922) In a situation where a plate glass window of premises demised in a business building was broken by a third person for whose conduct neither landlord nor tenant were responsible, the Court considered the effect of a lease covenant by the lessee to repair and adjudged as follows:

"Apparently in the case at bar the window was of considerable size, upon the street floor, adjacent to the sidewalk. It is essential in order to light the room leased. Its exterior surface was as indispensable to this end as its interior surface or its transparent substance. It would have been incompatible with the purposes of the lease and the valuable use of the room by the tenant for the landlord to have any right of control over the exterior of the window. The cleaning of both its outside and inside (in the absence of express agreement) would naturally be under the control of the tenant."

.....

"Since the plate glass window was included within the lease, the obligation to repair rested upon the tenant and not upon the landlord in the absence of some contract covering the subject."

Ginsburg v. Jacobson, 176 N.E. 918 -(1931) Mass.
Where, at the end of a lease term, the tenant delivered the demised premises to the landlord with an exterior wall of the premises in defective condition, the Court held that the lessee's covenants to keep the inside of the premises in the same condition as at the beginning of the term and to return the premises in good condition, required surrender of the entire building in good condition.

Irish v. Rosenbaum, 34 A 2d 486 - (1943) Pa.
In this case the lessee, under protest, paid the cost of repairing parapets and a cornice of a building which were broken, loose and about to fall. The lease provided that the lessee would during the term keep and, at the expiration thereof, deliver up the premises in as good condition as they were at completion of the building. The Court held that an affirmative burden was placed on the lessee to make all necessary repairs to protect the building from waste and ruin. The Court also held that where the lease required the lessee to keep, maintain, and operate a department store on the property, the lessee was bound to make all necessary repairs which the maintenance of a department store building and business would require. The Court further held that where the lease required lessee to operate a department store to be kept open for business every day, responsibility was placed upon lessee to do all those things which are necessary to operate the establishment every day.

Owsley v. Hamner, 30 Cal. 2d 710 - (1951)
It was held in this case that a lease of part of a building passes with it, as an incident thereto, everything necessarily used with or reasonably necessary to the enjoyment of the part demised. The Court also held (page 718) that passage ways, display windows and entrances to the demised premises were indicated on the plans at the time the lease was executed and that these factors point to their being appurtenant to the premises and as having been contemplated and designed and laid out when the lease was made.

Runyon v. City of Los Angeles, 40 Cal. App. 383-(1919) "When the premises are in good repair at the time they are let, and the landlord, under the terms of the lease, is not bound to keep them in repair, the tenant in possession, and not the landlord, is liable for an injury resulting from a failure to repair the pavement in front of the premises. (Lindstrom v. Pennsylvania Co., 212 Pa. 391, [61 Atl. 940]; Fisher v. Thirkell, supra.) The general rule is that it is the occupier, and he alone to whom such responsibility prima facie attaches. (Ahern v. Steele, 115 N.Y. 203, [12 Am. St. Rep. 778,5 L.R.A. 449, 22 N.E. 193]; City of Lowell v. Spaulding, 4 Cush. (Mass.) 277, [50 Am. Dec. 775].) To this general rule the following exceptions are recognized, and the owner of the leased premises may be made liable: 1. If the lease be one under which he, and not the tenant, is required to keep the premises in repair; 2. If the dangerous and defective condition by which the injury was occasioned existed when the premises were leased; 3. If that which occasioned the injury was, inherently, in its nature and character, a nuisance, and was upon the premises when the lease was executed."

Hamelin v. Foulkes, 105 Cal. App. 458 - (1930) This case involved the liability of the landlord and tenant for injuries sustained when a person was injured by a defective sidwalk hydrant box. The Court held that a lease of part of a building passes with it everything necessarily used with it or reasonably necessary to the enjoyment of the part demised and in this case the lease passed the sidewalk and hydrant box to the lessee. The Court reviewed a repair covenant in the lease which had been assumed by the lessee and held that the lessee was liable for injuries resulting from the lessee's failure to exercise ordinary care in keeping the premises in a safe condition.

The law of the foregoing cases when read in connection with the afore-quoted lease covenants of lessee, places the liability for repair of the windows and frames on City's lessee, Interstate Hosts, Inc.

Very truly yours,

THOMAS M. O'CONNOR
City Attorney

JEB/WFB

cc: Mr. Robert C. Kirkwood
Manager of Utilities

Mr. Harry D. Ross
Controller

Mr. George C. Negri
Director of Accounts

February 26, 1962

Mr. Thomas J. Mellon
President
The Police Commission
850 Bryant Street
San Francisco, California

Re: Taxicab Fund of California

Dear Sir:

Pursuant to your request, I have reviewed the various documents which you submitted to me in connection with the application of the Taxicab Fund of California under the provisions of Section 1080.2 of the Police Code.

The first paragraph of Section 1080.2 provides that "Any . . . association or organization of owners of vehicles for hire" showing a cash reserve of $25,000 shall be deemed in compliance with Sections 1075 to 1081 of the Police Code, which sections relate to insurance coverage.

Documents submitted by the Taxicab Fund of California indicate that it has on deposit in a savings account with Wells Fargo Bank American Trust Company the sum of $25,152.50. This satisfies the requirements of Section 1080.2 with respect to the existence of a cash reserve.

The second paragraph of Section 1080.2 provides that this cash reserve

> "shall be used for the purpose of satisfying and liquidating claims for damages to persons and property arising out of the negligence of the operators of said association, and shall

> be subject to execution in satisfaction of final judgment rendered against any operator or member of said organization or association . . . ."

The Taxicab Fund of California will not, itself, be operating any of the taxicabs from whose operation claims may arise. The taxicabs will be operated by and the permits for such taxicabs are issued to individual operators.

Consequently, the basic question which you present in your letter is whether a taxicab operator, who himself does not have a $25,000 cash reserve, can qualify as a self-insurer by becoming a shareholder in a corporation which does have a $25,000 cash reserve, all of the shareholders but one being taxicab operators.

Section 1080.2 speaks of an "organization of owners of vehicles for hire." If the Taxicab Fund of California issues its shares to operators of taxicabs, it will then constitute an "organization of owners of vehicles for hire" within the intent of Section 1080.2. If such organization is in compliance with Section 1080.2, each of its members will likewise be in compliance with Section 1080.2.

You are advised, therefore, that the Taxicab Fund of California, if it issues its shares simply to taxicab operators, will constitute an "organization of owners of vehicles for hire," and its shareholders would qualify as self-insurers under Section 1080.2 of the Police Code, so long as the cash reserve of $25,000 is maintained. In this latter connection, it should be noted that Section 1080.2 requires that the Taxicab Fund of California report monthly to the Police Commission the amount of its cash reserve and where the same is on deposit.

The number of taxicabs which may be operated on this $25,000 cash reserve is not stated in Section 1080.2. This is a matter within the Commission's discretion. If, in addition to the $25,000 cash reserve, the organization of owners carries liability insurance, the Commission would, of course, take this into account. Your letter, and the documents you attach, indicate that the Taxicab Fund of California and each taxicab operator are, or will be, insured to the extent of "$20,000 any one person, $50,000 any one accident, excess of $5,000 any one person, $10,000 any one accident." Thus, the $25,000 cash reserve will self-insure the first $5,000 of liability to any one person, or the first $10,000 of liability in any one accident, and the policy of insurance gives coverage for the next $20,000 of liability to any one person, or the next $50,000 of liability in any one accident. Under the provisions of Section 1080.2, the form of

the policy of insurance and approval of the company executing such policy are matters subject to the Commission's discretion.

The documents which you forwarded to me are returned herewith.

Respectfully submitted,

THOMAS M. O'CONNOR
City Attorney

DJG/GEB

LETTER NO. 62-3

May 14, 1962

Mr. Robert J. Dolan, Clerk
Board of Supervisors
Room 235, City Hall
San Francisco 2, California

Re: File 166-61: Responsibility of City, if any, to abutting property owners on Powhattan Street who built their houses above the established grade and now claim street improvement has endangered their properties with inadequate lateral support.

Dear Mr. Dolan:

Your request for advice to the Streets Committee of the Board of Supervisors on the above-mentioned matter may be summarized as follows:

Several property owners abutting Powhattan Street, between Moultrie and Anderson Streets, have protested to the Committee that their houses have become endangered by the recent improvement of said street. The official grade for Powhattan Street was established prior to 1910 which was before any of the houses were constructed on the block in question. This grade was revised in 1925 but the actual construction of the street was done just recently. Its construction was done to a grade about two feet upwards of the original established grade or the 1925 revised grade, accommodating as much as possible under all the circumstances the houses constructed on one side of the street above the established grade. The street was also constructed as far away from the foundations of the abutting houses as was reasonably feasible. Nevertheless, the protesting property owners allege that the street improvement has left the foundations of their houses without adequate lateral support.

The query of the Committee, therefore, is, "What, if any, responsibility the City has to protect these buildings against damage which might occur as a result of the street improvement?"

Our understanding is that no claim is being made that the street was constructed negligently, so liability, if any, must be considered under Article 1, Section 14 of the Constitution of California, which provides as follows:

> "Private property shall not be taken or damaged for public use without just compensation having first been made to . . . the owners." (Emphasis added)

The above provision making a damaging as well as a taking of private property ground for compensation in damages represents an addition to our State Constitution in 1879. Prior to that such damages were compensable only when there was an actual taking of the private property.

The leading case interpreting the addition of the word "or damaged" into the Constitution is Reardon v. The City and County of San Francisco, 66 Cal. 492, 501, 505, 506, which speaks as follows:

> "To what kind of damage does this word 'damaged' refer? We think it refers to something more than a direct or immediate damage to private property, such as its invasion or spoliation. There is no reason why this word should be construed in any other than its ordinary and popular sense. It embraces more than the taking. If it did not refer to more than the damage above mentioned, the word 'damaged' in the clause relied on would be superfluous. It seems to us that the direct invasions spoken of would come within the clause as it stood in the constitution of 1849. If the word 'damaged' only embraced physical invasions of property, the right secured by this word would add nothing to the guaranty as it formerly stood. In the case above cited from 99 U.S., the court said, referring to a clause in the constitution of Illinois similar to that in the constitution of this state in force since 1879, that 'this is an extension of the common provision for the protection of private property.'
>
> ". . . .
>
> "We cannot think that the convention inserting in the constitution of this state the word 'damaged' in the connection in which it is found, and the people in ratifying the work of the convention, intended to limit the effect of this word to cases where the party injured already had a remedy to recover compensation. They engaged in no such empty and vain

> work. It was intended to give a remedy, as well where one existed before as where it did not; to superadd to the guaranty found in the former constitution of this state, and in nearly all of the other states, a guaranty against damage where none previously existed. The provision includes damage to private property, including land, and whatever is attached to it. If land and buildings on it, or either are damaged, this provision requires it to be compensated."

Thus, the Reardon case determined that a cause of action exists in a property owner for damages independent of a "taking." However, this independent form of action has some limitations, one being when the affected property owners have disregarded the established grade at the time of building their houses and the municipality in thereafter constructing the actual grade has done all it reasonably can do to alleviate their situation.

Some of the language used by the Court in the old case of Eachus v. Los Angeles Consolidated Electric Railway Company, 103 Cal. 614, is perhaps susceptible to a contrary interpretation unless pondered very carefully in relation to the differing factual situation which was there involved. For one thing, the case contained no proof as to whether the official grade of the street involved was established before or after the aggrieved property owner built his house on the abutting property. Another thing is that the aggrieved property owner in that case had purchased the lot from the City as a part of a tract which the City itself had subdivided and dedicated the streets for public use, including ingress-egress easement rights to said streets. This right to ingress and egress was subsequently interfered with to a damaging extent by the defendant railway in establishing its railway bed in the street on which the aggrieved property owner's house fronted, and the Court cites the case of City of Denver v. Boyer, 7 Colo. 113, in support of holding that the property owner was entitled to compensation for his damages.

Said Denver case involved interpretation of a provision in the Colorado Constitution in all respects similar to the one before-quoted from the California Constitution. It is interesting to note, however, that while such an ingress-egress interference was upheld by the Colorado Supreme Court as a basis for compensation liability on the part of the municipality under said provision of the Colorado Constitution, that that same Court held differently in a later case involving facts similar to those we are considering here.

It was the case of City of Denver v. Vernia, 8 Colo.399, 8 Pac. Rep. 656, involving a situation where the improvements were made in disregard of a prior established official grade. That Court held that the protection afforded private property owners under the Colorado Constitution did not extend to a property owner in such a position, and in so holding said on page 660:

> ". . . The grade was fixed by the proper authorities long before the plaintiff's purchase of the property, although the street had not been lowered thereto. It was the plaintiff's duty to have inquired of the proper city officers, before his purchase, what the change [grade] was; when, if found objectionable for the purposes to which he desired to appropriate the property, he could have chosen a more eligible site. Especially was it his duty to have ascertained the grade before erecting his improvements. . . . He must be presumed to have known what this grade was when he erected his improvements, and to have built with reference thereto. The plea of ignorance of the fact cannot, under the circumstances of this case, prejudice the municipality."

As far as I have been able to discover, the California Supreme Court has not yet ruled on a similar factual situation, but I am satisfied that when it does it will probably follow the reasoning set forth in said Vernia case, and other similar cases which might be cited. In the Vernia case an ordinance required an owner of land to ascertain the official grade before building. Our ordinances do not specifically impose such a duty, but I do not believe that this difference is necessarily decisive.

Accordingly, it is my opinion that the City has no liability to the protesting owners on Powhattan Street for the manner in which it recently graded and paved said street. While the street was not paved to the original established grade, the change was to a better and higher grade in so far as the protesting property owners are concerned, and to the best grade possible for them under all of the circumstances. This, I believe, places the City beyond any liability under Article 1, Section 14 of the Constitution of California, as above quoted.

You are so advised.

Very truly yours,

THOMAS M. O'CONNOR
City Attorney

RJR/GEB

LETTER NO. 62-4

May 24, 1962

Mr. V. W. Anderson
General Manager
Municipal Railway
949 Presidio Avenue
San Francisco 15, California

Subject: Replacement of Property
Charter Section 151.6
S.F. Adm. Code Secs. 10.25-1 - 10.25-7

Dear Mr. Anderson:

This is in reference to your letter of May 3, 1962, wherein you raise the question of the applicability of the above-captioned charter section and Administrative Code sections to the replacement of the cost of property stolen from a coach operator.

Section 151.6 of the Charter provides, in part, as follows:

> ". . . the board of supervisors may provide by ordinance for the payment of the costs of replacing or repairing equipment, property, or prostheses of any uniformed officer or employee of the police department, fire department, sheriff's office or municipal railway, such as, but not confined to, eyeglasses, hearing aids, dentures, watches, or articles of clothing necessarily worn or carried by such employee when any such items are damaged in the line of duty without fault of the employee. If the items are damaged beyond repair, the actual value of such items may be paid. The value of such items shall be determined as of the time of the damage thereto...."

Pursuant to Charter Section 151.6 the board of supervisors adopted an ordinance as therein provided, (Ordinance No. 90-62) and this ordinance has been codified in the San Francisco Administrative Code. (Sections 10.25-1 through 10.25-7)

Ordinance No. 90-62 provides, in general, that uniformed officers and employees of the Municipal Railway may recover the cost of replacing or repairing equipment, property or prostheses which has been damaged in the line of duty without fault of the officer or employee. A verified claim must be filed with the department head within thirty (30) days after the date of occurrence. Payment shall be made by the controller when: (a) a verified claim has been filed; (b) the department head certifies to the controller that the damages occurred in the line of duty and that the amount certified for payment is fair and reasonable; and (c) funds are available for the purpose. The controller is authorized to establish rules and regulation and devise forms necessary to carry out the purposes of the ordinance which are to be binding upon the claimant and department head. (S.F. Adm. Code, Secs. 10.25-1 - 10.25-7)

It is my understanding that, to date, the controller has neither established rules and regulations nor devised the forms referred to in the legislation but that such work is underway.

However, it is obvious that any rules and regulations established by the controller are necessarily limited by the language of the ordinance that they be "necessary to carry out the purposes of this Section." (Section 10.25-1 through 10.25-7, San Francisco Administrative Code.)

The basic purpose of the section is to reimburse a uniformed officer or employee of the City and County for the cost of repairing or replacing equipment, property or prosetheses when such items are <u>damaged</u> in the line of duty without fault of the employee.

Thus the sole issue raised by your letter is whether or not the loss by robbery of property of a uniformed employee while on duty constitutes a damaging of such property as contemplated by Sections 10.25-1 through 10.25-7 of the San Francisco Administrative Code.

As a general rule, legislative enactments should be construed in accordance with the ordinary meaning of the language used. (45 Cal. Jur. 2d 647.)

In this respect "damaged" has been defined as follows:

> "Damaged. Made less valuable, less useful or less desirable." (Black's Law Dictionary)
>
> "Damaged. As applied to property, the word imports some disturbance to its intrinsic value; some damage to the property as property." (Ballentine's Legal Dictionary)
>
> "Damage. Loss due to injury." (Webster's New International Dictionary, 2d Ed.)

The language of Charter Section 151.6 is almost identical with the language of California Government Code Section 19258, relating to State employees. However, no California court has ever been called upon to interpret Government Code Section 19258. In such a case it becomes necessary to look to the decisions of other jurisdictions for cases involving circumstances analogous to the case in question, since such decisions, although not binding upon a California court, would be persuasive authority and be indicative of the decision likely to be rendered by a California court.

In Goldman v. Forcier (1942) 68 R. I. 291, 27 A 2d 340, the Supreme Court of Rhode Island held that a state statute imposing liability upon cities to indemnify owners of property destroyed or injured by riots was restricted to property actually destroyed or injured by riot and did not extend to loss of property by theft during a riot, since the words "destroy," "injure," "destruction" and "injury" do not mean or imply the felonious taking and carrying away of another's property.

In reaching this conclusion the court said, in part:

> "... By limiting recovery to ... 'property' that is 'destroyed' or 'injured' in a riot, the legislature precluded the inference that it intended the statute to also cover property that was neither destroyed nor injured, but was taken and carried away with intent to steal it. If the omission of terms or language sufficient to indicate that it was the intention of the legislature to allow recovery for

property stolen during a riot was due to accident, then it belongs to the legislature to supply such terms or language. It is not within our province to insert in a statute omitted words or language, unless the legislative intent thus to have it read is plainly evident in the statute." (27 A 2d 340, 343)

In my opinion, the issue presented in your letter is on all fours with the issue presented in the Goldman case, supra, and the holding therein,coupled with the general rule that statutes be construed in accordance with the ordinary meaning of the language used, would be followed by a California court and would preclude any payment in the present case.

Very truly yours,

WILLIAM F. BOURNE
Public Utilities Counsel

JJS/WFB

June 12, 1962

Civil Service Commission
151 City Hall
San Francisco 2, California

Attention: Mr. George J. Grubb
General Manager, Personnel

Re: Necessity of Keeping a Record of Proceedings and the Legality of Doing So by Use of a Tape Recorder

Gentlemen:

Reference is made to your inquiry as a Commission relative to the matter above stated.

Pertinent to your inquiry is that part of Section 140 of the Charter which provides as follows:

> "The regular meetings of the civil service commission shall be open to the public and held at such a time as will give the general public and employees of the city and county adequate time within which to appear before the commission after the regular daily working hours of 8 A.M. to 5 P.M. Such person or persons shall be given an opportunity to be heard by the commission before final action is taken in any case involving such person or persons."

Your regular meetings, therefore, are to serve as a hearing body for employees appealing from departmental rulings and for employees or members of the public to present their requests or grievances with respect to the exercise of your powers under Section 140 through Section 157 of the Charter. Some of these matters will doubtless involve the Commission in the performance of quasi-judicial functions. Such functions are defined in "Words and Phrases," as follows:

"The term quasi-judicial is used to describe acts, not of judicial tribunals usually, but acts of public boards and municipal officials, presumed to be the product or result of investigation, consideration and human judgment, based on evidentiary facts of some sort, in a matter within the discretionary power of such board or officer."

While I find no express mandate in the Charter requiring the Commission to keep records of its proceedings, Section 141 does empower it with the right to adopt rules reasonably necessary to carrying out its total function. That certainly includes the power in the Commission to adopt any rules reasonably necessary with respect to preserving a reliable and adequate record of its proceedings.

What may be adequate for some phases of your proceedings may well not be adequate for other phases. Ordinarily, in the absence of a statutory requirement otherwise, a good and fair system of keeping minutes, though not verbatim in character, ought to be sufficient. In the performance of the Commission's functions, however, especially those that may be classified as quasi-judicial in character, I believe it is well within the Commission's discretion to determine that a full and complete record of its proceedings be kept.

The United States Supreme Court has held that failure of an administrative body to keep a reliable record of proceedings upon a hearing to determine the substantial rights of an aggrieved person may constitute denial of procedural due process of law under the 14th Amendment of the Federal Constitution. (Kwock Jan Fat v. White, 253 U.S. 455; 64 L. Ed. 1010) This is understandable in the light of the fact that the courts in adjudging the validity of discretionary decisions made by administrative bodies usually restrict their considerations to whether such bodies act reasonably and without abuse of discretion. A reliable record, of course, is of great aid to the court in the making of such a determination both from the standpoint of the aggrieved or the administrative body.

Thus, in the case of Nishkian v. City of Long Beach, 103 C.A. 2d 749, 752, we find the court emphasizing this point as follows:

> "In proceedings of this kind, quasi judicial in nature, witnesses should be sworn and examined, and a record made, upon which reviewing courts may be enabled to determine whether substantial evidence was or was not considered by the quasi judicial body. The proceedings should be conducted in a quasi judicial manner at least."

The same principle of consideration was likewise enunciated in the 1961 appeal case of Flaherty v. Board of Retirement, 198 A.C.A 421, 427, as follows:

> "Moreover an adequate record of the proceedings should be made so that a complete picture of the course thereof may be presented to the court in a proceeding such as the present."

My conclusion, therefore, is that the Commission has full discretionary power to adopt rules governing its method of keeping an adequate record. It is not statutorily required to keep a verbatim record but that may well be the safest course of procedure when acting in its quasi-judicial capacity.

One method of accomplishing the objective of a verbatim record is by use of a reliable tape recording machine. I, therefore, advise that to the extent the Commission adopts a rule requiring a verbatim record of its proceedings, keeping such a record by use of a tape recording machine is legal and in order. The transcript of a conversation recorded by a witness has been held to be on parity with the handwritten transcription of a conversation for purposes of refreshing one's memory; so in the absence of a statutory command to keep a verbatim record otherwise, I see no reason why the tape recording method is not legal and proper. (People v. Goldberg, 152 C.A. 2d 562, 574) You are so advised.

Very truly yours,

THOMAS M. O'CONNOR
City Attorney

RJR:hef

NOV 26 1962
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